73-1121

Supreme Court, U. S.
FILED
JAN 18 1974
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

BY

NORTH GEORGIA FINISHING, INC., Petitioner

V.

DI-CHEM, INC., Appellee

THE FIRST NATIONAL BANK
OF DALTON, Garnishee

from

SUPREME COURT OF THE STATE OF GEORGIA

IN ITS CASE NO. 28,217

Warren N. Coppedge, Jr.
Nathaniel Hansford
MITCHELL, MITCHELL, COPPEDGE & BOYETT
101 NORTH THORNTON AVENUE
DALTON, GEORGIA 30720

ATTORNEYS FOR PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D.C.

PETITION FOR CERTIORARI

This is a petition to the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of Georgia to submit for review and reversal here the opinion and decision of the Supreme Court of the State of Georgia entered October 25, 1973, in its Case Number 28217, entitled NORTH GEORGIA FINISHING, INC., Appellant, V. DI-CHEM, INC., Appellee; FIRST NATIONAL BANK OF DALTON, Garnishee.

The opinion of the Georgia Supreme Court is officially reported in 231 Georgia Supreme Court Reports, Page 260, (1973). Writ of certiorari to the Georgia Court of Appeals was granted by the Georgia Supreme Court and is officially reported in 230 Georgia Supreme Court Reports, Page 623, (1973). The decision of the Court of Appeals of Georgia is officially reported in 127 Georgia Court of Appeals Reports, Page 593, (1972). This case was originally appealed from the Whitfield County Superior Court to the Supreme Court of Georgia which transferred without opinion to the Georgia Court of Appeals. These opinions and notice of denial of rehearing and notice of transfer appear herein as an appendix, in accordance with Rule 39.

The decision of the Supreme Court of the State of Georgia hereby appealed from was rendered October 25, 1973, denying Appellant-Petitioner's Motion for Rehearing of opinion entered October 4, 1973.

Jurisdiction of this Court to review this cause is

believed to exist in United States Code Title 28 Section 1257.

QUESTION PRESENTED (RULE 231(c)

Is Georgia Code Title 246 Section 101, insofar as it provides for the taking of property without prior notice and hearing through Process of Garnishment where suit shall be pending but before judgment, unconstitutional as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

STATE STATUTE INVOLVED (RULE 231(d))

Georgia Code Annotated Section 46-101.

"*Right to writ; wages exempt until after final judgment* — In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly, or monthly wages of any person residing in this State: Provided, further, that the wages of a share cropper shall also be exempt from garnishment until after final judgment shall have been had against said share cropper: Provided, further, that nothing in this section shall be construed as abridging the right of garnishment in attachment before judgment is obtained."

STATEMENT OF THE CASE (RULE 231(e))

On the August 20, 1971, DI-CHEM, INC., filed a complaint on an account against North Georgia Finishing, Inc. Also, on August 20, 1971, immediately after filing said suit, DI-CHEM, INC., filed with the Clerk of the Superior Court of Whitfield County, Georgia, an affidavit and bond for garnishment pursuant to Georgia Code Title 46, Sections 101 and 102 against The First National Bank of Dalton, as garnishee. The Clerk of the Whitfield Superior Court, immediately issued and had served upon the garnishee on August 20, 1971, the summons of garnishment. North Georgia Finishing, Inc., was not served with a copy of the process of garnishment and had no knowledge of same prior to service of summons on the garnishee. The affidavit and bond for garnishment was executed by an agent of the appellee pursuant to Georgia Code Title 46, Sections 101 and 102 on the basis of "a suit pending". North Georgia Finishing, Inc., had on deposit in The First National Bank of Dalton, at the time the summons of garnishment was served, a certain sum of money which constituted its payroll account. The effect of this garnishment action was to freeze whatever funds North Georgia Finishing, Inc. had on deposit in The First National Bank of Dalton at that time. On 23 August, 1971, North Georgia Finishing, Inc. posted a dissolutionment bond "to create standing" as required by law and the garnishee was discharged by order of the Superior Court of Whitfield County, Georgia. On September 15, 1971, North Georgia Finishing, Inc., filed with the Superior Court of Whitfield County a motion to dismiss the garnishment action. A hearing was held before the Whitfield County Superior Court on 29 November, 1971; and in an order of that Court dated 2 December, 1971, the motion to dismiss the writ of

garnishment was denied. The Superior Court issued at a later date a supplemental record on appeal in which it stated, "The pleadings of record raised generally the issue of constitutional due process, but did not specifically raise the due process issue of notice and hearing, however, during argument of counsel certain cases were cited as authority by counsel for both parties and the Court's attention was specifically directed to the constitutional due process issue of notice and prior hearing as the same pertain to the facts of the instant case".

This action was appealed to the Supreme Court of Georgia which transferred the case to the Georgia Court of Appeals without opinion. The Court of Appeals of Georgia in a five to four decision ruled that the proceedings below had not, under Georgia procedure, raised the constitutional issue. However, a writ of certiorari to the Court of Appeals to reveiw that Court's judgment was granted by the Supreme Court of Georgia. In its opinion, the Supreme Court of Georgia discussed the issue of whether the constitutional question had been raised and ruled, "This Court now has before it the question of whether an attack on Code Annotated § 46-101 on the ground that it violates the due process and equal protection clauses of the State and Federal Constitutions is sufficiently raised by the pleadings and argument of counsel before the trial court as to be now considered by this Court. Although the pleadings generally raise the issue of due process and equal protection, the argument of counsel before the trial court that it was deprived of notice and hearing before its property was taken was not raised in the pleadings. No objection was made, however, on this ground and the trial judge specifically stated that he overruled the defendant's motion to dismiss the process of garnish-

ment on each and every ground therein. The Civil Practice Act of 1966 (Ga. L. 1966, p 609, Code Ann. §81A-108 (a)) has eliminated issue pleadings and has substituted notice pleadings. *Reynolds v. Reynolds*, 217 Ga. 234, 246 (3) (123 SE2d 115); *Brown v. Herring*, 225 Ga. 67 (3) (166 SE2d 89). Therefore, we find that the attack on Code Ann. §46-101 and the argument of counsel made without objection sufficiently presented the constitutional question to the trial court. The trial court specifically ruled on each and every ground thereof and this Court can now consider its ruling."

ARGUMENT FOR THE ALLOWANCE OF WRIT— RULE 231(h)

North Georgia Finishing, Inc. has been deprived of the use, benefit, and possession of funds in its bank account by State action in the garnishment of its account without prior notice or prior hearing.

The Supreme Court of the State of Georgia has determined that Georgia Code Title 46 Section 101 is not violative of the Fourteenth Amendment to the United States Constitution. This determination is not in accord with the holdings of the United States Supreme Court in *Snidach v. Family Finance Corp.*, 395 U.S 337, 89 S.Ct. 1820 (1969), and *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972). The Supreme Court of Georgia in making such a determination has decided a federal question of substance not heretofore ruled upon directly by the United States Supreme Court but which opinion is in conflict with related decisions of the United States Supreme Court.

January 4, 1974

Mrs. Joline B. Williams, Clerk
The Supreme Court of Georgia
Judicial Building
Capitol Square South
Atlanta, Georgia 30303

ORDER OF RECORD AND
NOTICE OF CERTIORARI

RE: North Georgia Finishing, Inc., Appellant
V. Di-Chem, Inc., Appellee; First National
Bank of Dalton, Garnishee
Supreme Court of Georgia Case No. 28217

Dear Mrs. Williams:

Confirming our earlier conversations, please take this as *notice of appeal* to the United States Supreme Court, Washington, D. C., by North Georgia Finishing, Inc., from the order of the Georgia Supreme Court in the Court's decision of October 25, 1973, denying Appellant's Motion for Rehearing in Case No. 28217, as above, this appeal to be by certiorari under Rule 23 and others.

Pursuant to Rule 12 of the Supreme Court Rules, Title 28, United States Code §2071, et. seq., you are hereby respectfully requested to certify the entire record in this case and to provide for its transmission to the Supreme Court of the United States, Washington, D.C.

This appeal by certiorari is taken persuant to United States Code Title 28, Section 1257. Appellant North Georgia Finishing contends that Georgia Code Title 46, Section 101, insofar as it provides for the taking of

property without prior notice and hearing through process of garnishment where suit shall be pending but before judgment, is unconstitutional as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Please prepare the aforesaid transcript of the record for transmission to the United States Supreme Court, and include the entire record.

Thank you.

Respectfully,

MITCHELL, MITCHELL,
COPPEDGE & BOYETT

/s/ Warren N. Coppedge, Jr.

Warren N. Coppedge, Jr.
Nathaniel Hansford

WNCjr/NH:kj

cc: H. E. Kinney, Esq.

cc: Carlton McCamy, Esq.

PROOF OF SERVICE

GEORGIA, WHITFIELD COUNTY.

I, WARREN N. COPPEDGE, JR., Attorney for Appellant, North Georgia Finishing, in Case No. 28,217 in the Supreme Court of the State of Georgia, against Di-Chem, Inc., appellee, and First National Bank of Dalton, garnishee, do hereby swear that on this the 4th day of January, 1974, I served a copy of the foregoing Notice of Appeal by Certiorari to the Supreme Court of the United States on Di-Chem, Inc., Appellee, and First National Bank of Dalton, garnishee, by mailing a copy of the foregoing notice and request for the record to their counsel of record, H. E. Kinney, Esq., Pittman, Kinney, Kemp, Pickell & Avrett of Dalton, Georgia, and Carlton McCamy, Esq., McCamy, Minor, Phillips & Tuggle of Dalton, Georgia.

/s/ Warren N. Coppedge, Jr.

WARREN N. COPPEDGE, JR.
APPELLANT'S ATTORNEY

Sworn to and subscribed before me,
this the 4th day of January, 1974:

/s/ Kaye C. Jordan

NOTARY PUBLIC, GA. STATE AT LARGE

APPENDIX A

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, October 25, 1973

Dear Sir:

The motion for a rehearing was denied today: Case No. 28217, North Georgia Finishing, Inc. v. Di-Chem, Inc., et al.

Yours very truly,

Mrs. Joline B. Williams, Clerk

APPENDIX B

SUPREME COURT OF GEORGIA

28217. NORTH GEORGIA FINISHING, INC. v. DI-CHEM, INC. et al.

Undercofler, Justice. Di-Chem, Inc., filed a complaint on an account against North Georgia Finishing, Inc. Immediately after filing said suit, Di-Chem, Inc., filed an affidavit and bond for garnishment against the First National Bank of Dalton, as garnishee.

North Georgia Finishing, Inc., filed a motion to dismiss the writ of garnishment on the ground that Code Ann. § 46-101 providing for garnishment in this state is unconstitutional because it violates the due process and equal protection clauses of the State and Federal Constitutions. After hearing argument on this issue, the trial court overruled the motion and signed a certificate for immediate review. The appeal is from this judgment. *Held:*

1. The defendant moved to dismiss the garnishment on the ground that it was issued under the authority of Georgia "Code Annotated § 46-101" and that it violated his rights of due process and equal protection guaranteed by the Constitutions of Georgia and the United States. The trial court certified: "The Court, at said hearing, considered the pleadings of record in said case and entertained argument of counsel. The pleadings of record raised generally the issue of constitutional due process, but did not specifically raise the due process issues of notice and hearing, however, during argument of counsel certain cases were cited as authority by counsel for both parties and the court's attention was specifically directed to the

constitutional due process issues of notice and prior hearing as the same pertain to the facts of the instant case." Counsel for the plaintiff made no objection concerning the issues of hearing and notice as the same were raised in the argument of the defendant. After hearing argument of counsel, the court entered an order overruling the defendant's motion to dismiss the process of garnishment on each and every ground therein and certified the question for immediate review.

This court now has before it the question of whether an attack on Code Ann. § 46-101 on the ground that it violates the due process and equal protection clauses of the State and Federal Constitutions is sufficiently raised by the pleadings and argument of counsel before the trial court as to be now considered by this court. Although the pleadings generally raise the issue of due process and equal protection, the argument of counsel before the trial court that it was deprived of notice and hearing before its property was taken was not raised in the pleadings. No objection was made, however, on this ground and the trial judge specifically stated that he overruled the defendant's motion to dismiss the process of garnishment on each and every ground therein.

The Civil Practice Act of 1966 (Ga. L. 1966, p. 609; Code Ann. § 81A-108 (a)) has eliminated issue pleadings and has substituted notice pleadings. *Reynolds v. Reynolds*, 217 Ga. 234, 246 (123 SE2d 115); *Bourn v. Herring*, 225 Ga. 67 (3) (166 SE2d 89). Therefore, we find that the attack on Code Ann. § 46-101 and the argument of counsel made without objection sufficiently presented the constitutional question to the trial court. The trial court specifically ruled on each

and every ground thereof and this court can now consider its ruling.

2. Code Ann. § 46-101 provides: "In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly or monthly wages of any person residing in this State until after final judgment shall have been had against said defendant. . ." Code Ann. § 46-102 requires the complainant, his agent, or attorney at law to make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which said garnishment is being filed or in which the main cause is filed, stating the amount claimed to be due in such action, or on such judgment, and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue and shall give bond, with good security, in a sum at least equal to double the amount sworn to be due, payable to the defendant in the suit or judgment, as the case may be, conditioned to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment, in the event that the complainant shall fail to recover in the suit, or it shall appear that the amount sworn to be due on such judgment was not due; or that the property or money sought to be garnished was not subject to process of garnishment. Code Ann. § 46-105 provides for the summons of garnishment directed to the garnishee, the service, bond and subsequent proceedings. Ga. L. 1962, pp. 717, 718; 1964, pp. 220, 221.

After garnishment has been issued, the defendant may

dissolve the garnishment by filing a bond. Code § 46-401.

The appellant contends that the Georgia garnishment statute is unconstitutional because it does not provide the debtor with notice and an opportunity to be heard before his property is taken. It argues that Sniadach v. Family Finance Corp., 395 U.S. 337 (89 SC 1820, 23 LE2d 349) requires such a holding.

In Sniadach the Supreme Court of the United States (p. 340) held: "A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 U. S. 820 [49 SC 344, 73 LE 975], does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. *We deal here with wages—a specialized type of property* presenting distinct problems in our economic system. We turn then to the nature of *that* property and problems of procedural due process." (Emphasis supplied.)

"McKay was but a one sentence per curiam upon affirming the judgment of the Supreme Court of Maine, viz., McInnes v. McKay, 127 Me. 110 (141 A 699) (1928). The Maine court's opinion was a positive rejection of the view that attachment (which as the opinion indicates, could be equated with garnishment) constitutes an unconstitutional deprivation of property without due process of law. The Maine court recognized the obviously drastic character of attachment in the manner in which it interferes with the incidents of ownership prior to any judgment on the plaintiff's claim having been

made, but held that the deprivation of that 'property' was not 'the deprivation of property' contemplated by the Constitution. And if it be, it is not deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment. . . 141 A. at 702." American Olean Tile Co. v. Zimmerman, 317 FSupp. 150, 151 (USDC Hawaii 1970).

In Georgia the writ of garnishment is ancillary to the main action pending between the plaintiff and the defendant. *Dent v. Dent,* 118 Ga. 853 (1) (45 SE 680). "The plaintiff shall not have judgment against the garnishee until he shall have obtained judgment against the defendant." Code § 46-405. "The effect of the writ of garnishment is, therefore, to impound any asset or property of defendant which is found in the hands of the garnishee pending the resolution of the merits of the garnisher's claim. The writ itself constitutes, at most, a lis pendens notice that a right to perfect a lien on the garnisheed property exists, but such perfection must await judicial action." Kuffel v. United States, 103 Ariz. 321, 325 (441 P2d 771).

It follows that the Sniadach decision would indicate that the Supreme Court did nothing more than carve out an exception for wage earners from what the court deemed to be otherwise lawful prejudgment seizures, i. e., that garnishment of wages was a limited exception to the general rule of legality of garnishment statutes.

Blocker v. Blackburn, 228 Ga. 285 (185 SE2d 56) which held that Georgia's distress warrant proceed-

ings were unconstitutional and *Hall v. Stone*, 229 Ga. 96 (189 SE2d 403) which held that Georgia's bail trover statute was unconstitutional are not controlling here. In those cases, the property was seized without any notice to the owner.

This court is not alone in limiting the reach of the Sniadach decision to wages. See Roofing Wholesale Co. v. Palmer, 108 Ariz. 508 (502 P2d 1327); American Olean Tile Co v. Zimmerman, 317 FSupp. 150, supra; Black Watch Farms v. Dick, 323 FSupp. 100 (USDC Conn. 1971).

Other courts have come to an opposite rule. See Larson v. Fetherston, 44 Wis. 2d 712 (172 NW2d 20); Jones Press v. Motor Travel Services, 286 Minn. 205 (176 NW2d 87); Randone v. Appellate Dept. of Superior Court, 5 Cal. 3d 536 (488 P2d 13, 96 Cal. Reptr. 709).

Judgment affirmed. All the Justices concur, except Mobley, C. J., Grice, P. J., and Nichols, J., who concur specially because of the ruling in Division 1.

ARGUED SEPTEMBER 11, 1973 — DECIDED OCTOBER 4, 1973 — REHEARING DENIED OCTOBER 25, 1973.

Garnishment; constitutional question. Whitfield Superior Court. Before Judge Vining.

Mitchell, Mitchell, Coppedge & Boyett, Samuel J. Brantley, for appellant.

H. E. Kinney, for appellees.

GRICE, Presiding Justice, concurring specially. I am

in full accord with everything stated in the opinion except Division 1, as to making a constitutional attack.

While the law of the case has been established as to the sufficiency of the attacks made here by virtue of *North Ga. Finishing v. Di-Chem*, 230 Ga. 623 (198 SE2d 284), I desire to take this opportunity to express some views that I have on the subject.

Requirements for attacking the constitutionality of a statute have been in force for many years in this state. The following statement of them should suffice.

"In order to raise a question as to the constitutionality of a 'law' . . . at least three things must always be shown: (1) the statute or part of a statute which the party would challenge must be stated, or pointed out with fair precision; (2) the provision of the Constitution which it is claimed has been violated must also be clearly designated; and (3) it must be shown wherein the statute violates such constitutional provision. [Cits.]" *Stegall v. Southwest Ga. Housing Authority*, 197 Ga. 571, 582 (30 SE2d 196).

There is indeed a solid reason for these requirements. It has been well put. "Since a statute is presumed to be valid and constitutional until the contrary appears, and can not be lawfully set aside by the courts unless the alleged conflict with the Constitution is plain and palpable, the burden is upon any party who assails it to present his attack in clear and definite terms, in order to call forth judicial action concerning it. In so grave or important a matter as declaring invalid an act of a co-ordinate department of government, the courts will not act upon vague and uncertain charges, and should decline to do so unless and until a clear

and specific contention or question is presented for determination. [Cits.]." *Abel v. State*, 190 Ga. 651, 654 (10 SE2d 198).

Accordingly, on many occasions this court has refused to consider attacks which do not measure up to these requirements.

As I view this record, the motion to dismiss the garnishment fails to set forth or point out with fair precision the *statute* which is challenged.

This court has consistently held that mere designation of "Georgia Code Annotated," or the like, without reference to the statute itself, is not sufficient. There has been no legislative enactment officially adopting such code as law. Therefore it does not have the legal effect of a statute.

In *Bowen v. State*, 215 Ga. 471 (111 SE2d 44) it was sought to attack the constitutionality of "subparagraph (a) of Code (Ann.) § 68-1626." However this court held as follows: "The attempt thus to attack the constitutionality of subparagraph (a) of Code (Ann.) § 68-1626 is futile, since there is no such paragraph and section in the official Code of 1933. Such subparagraph and such section have never become law in consequence of any necessary and required adopting or enacting legislative action. Hence, any decision rendered by this court at this time respecting the validity or the invalidity of subparagraph (a) of Code (Ann.) § 68-1626 would in no way affect the act from which these provisions were taken and placed in an unofficial annotated Code, which a publishing company in the City of Atlanta compiled for distribution and sale."

In *Widemon v. Burson*, 224 Ga. 665 (164 SE2d 128), each enumeration of error complained of failing to declare a section of the Annotated Code unconstitutional. This court held that "Any ruling upon the constitutionality of a section of the Annotated Code, which has never been adopted by the General Assembly, an essential necessary for it to become law, would in no wise affect the Act of the General Assembly from which the section of the Annotated Code was taken."

In *Turk v. State Hwy. Dept.*, 226 Ga. 245, 246 (174 SE2d 791), the attack was made upon "section 36-1307 Ga. Code Ann." This court held that this designation was not sufficient.

See also, *Morgan v. Todd*, 214 Ga. 497, 499 (106 SE2d 37); *Holmes v. State*, 224 Ga. 553, 558 (163 SE2d 803); *Cox v. Burson*, 226 Ga. 13 (2) (172 SE2d 406).

These unreversed unanimous decisions of this court are binding precedents which should have been adhered to in the disposition of this matter.

This court has spoken many times on the effect of unanimous unreversed decisions. In *Crown Laundry v. Burch*, 205 Ga. 211, 212 (53 SE2d 116), referring to three such decisions, Mr. Justice Candler speaking on behalf of the full-court declared: "Those cases are unquestionably authority for the ruling complained of; and the three cases from this court are all full-bench decisions which have not been overruled or materially modified, and since they are not in conflict with any of our older decisions, they are binding upon us and must be followed. There is no request to review and overrule those decisions in the manner prescribed by law (Code, § 6-1611), and so long as they are permitted to stand they have the *force*

and effect of a statute and are controlling on the question there decided." (Emphasis supplied.) See also *Hagan v. Asa G. Candler, Inc.*, 189 Ga. 250, 258 (5 SE2d 739, 126 ALR 108).

Reference to "Georgia Code Annotated" has been for mere convenience and aid in locating the law of this state and when it has been accompanied by citation to the statute enacted by the General Assembly there has been no problem. But here no such accompanying reference is made. The citation is only "Georgia Code Annotated § 46-101." With due regard for the high quality of the codal publication involved here, we must conclude that reference to it alone does not constitute a legal citation. We cannot take judicial notice of it.

These requirements for attacking a statute were not done away with by the Civil Practice Act (Ga. L. 1966, p. 609 as amended; Code Ann. § 81A-101 et seq.) or the Appellate Practice Act (Ga. L. 1965, p. 18, as amended; Code Ann. § 6-701 et seq.)

Rather, without exception, they have been reaffirmed in many cases of this court decided after the passage of these Acts, as is shown in the cases cited hereinbefore. Significantly, in none of such cases are those Acts ever mentioned.

There is no language in the Civil Practice Act which gives any support to the contention that it abrogated the requirements for challenging the constitutionality of a statute. None is forthcoming from Section 1 of that Act (Ga. L. 1966, pp. 609, 610; Code Ann. § 81A-101) to the effect that it governs procedure in all courts of record in all civil suits, with a noted exception, or from the provision which recites that the Act "shall be construed to secure

the just, speedy and inexpensive determination of every action." I approve of these objectives but the Act does not change the law involved here.

Furthermore, the concept of notice *pleading* derived from Section 8 of the Civil Practice Act and exemplified by such cases as *Bourn v. Herring*, 225 Ga. 67 (3) (166 SE2d 89) and *Harper v. DeFreitas*, 117 Ga. App. 236, 238 (160 SE2d 260) is not applicable here. This is because a *motion* is not a pleading within the purview of the Civil Practice Act.

In this regard, Section 7 of that Act (Ga. L. 1966, pp. 609, 618; 1967, pp. 226, 230; Code Ann. § 81A-107) makes a clear distinction.

Subsection (a) of that section is headed "Pleadings," and enumerates specifically what pleadings are allowed, making no reference whatever to *motions*.

On the other hand, subsection (b) is headed "Motions and other papers," and in material part provides as follows: "(1) An application to the court for an order shall be made by motion which . . . shall state *with particularity* the grounds therefor . . . (2) The rules applicable to captions, signing, and all other matters of *form* of pleadings apply to all motions and other papers provided for by this Title:" (Emphasis supplied.)

This last provision, as to "matters of form," obviously does not relate to the content of the attacks made upon the constitutionality of a statute, as called for by the requirements set forth previously in this opinion.

It is significant that Section 7 (b) (1) requires that the grounds of motions be stated with *particularity*. Here

the motion to dismiss the garnishment did not do so.

Thus, as I apprise the situation, nothing in the Civil Practice Act abrogates the aforementioned requirements for attacking the validity of a statute.

Likewise, there is no provision in the Appellate Practice Act. (Ga. L. 1965, p. 18; Code Ann. § 6-701 et seq.) which does so. Section 23 (Ga. L. 1965, pp. 18, 40; Code Ann. § 6-905), which declares in substance that the Act is intended to provide a new appellate procedure, and should be liberally construed to bring about a decision on the merits to avoid dismissal of appeals except as specifically referred to therein, has my full support. However, it has nothing to do with the requirements of making a proper attack upon the constitutionality of a statute.

As I view it, there is no merit in the contention that the plaintiff's failure to object in the trial court to the content of the defendant's grounds for dismissal of the garnishment proceeding and the argument on certain cases resulted in a waiver of its right to challenge now the rules for attacking the validity of the garnishment statute. As stressed in this concurring opinion these are well established requirements for making such attacks. The burden is upon the party making the attacks to do so properly. It was not carried here.

I am authorized to state that Chief Justice Mobley and Justice Nichols join me in this special concurrence.

APPENDIX C

COURT OF APPEALS
of the State of Georgia

Atlanta, July 9, 1973

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

NORTH GEORGIA FINISHING, INC. v.
DI-CHEM, INC. et al.

In accordance with the mandate of the Supreme Court, this case is transferred to the Supreme Court. See North Georgia Finishing Company, Inc. v. Di-Chem, Inc. et al, No. 27697, decided May 24, 1973.

COURT OF APPEALS OF THE STATE OF GEORGIA
Clerk's Office, Atlanta July 9, 1973

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

APPENDIX D

SUPREME COURT OF GEORGIA

27697. NORTH GEORGIA FINISHING, INC. v. DI-CHEM, INC.

PER CURIAM. This case comes here by grant of a writ of certiorari to the Court of Appeals to review that court's judgment. 127 Ga. App. 593 (194 SE2d 508).

The original appeal was to this court, and this court erroneously transferred the case to the Court of Appeals.

We now conclude that a constitutional issue was sufficiently raised, that the judgment of the Court of Appeals was erroneous, and that judgment must be reversed.

Upon remand to the Court of Appeals, direction is given that the case be retransferred to this court for re-docketing here, so that the constitutional issues raised may be argued and decided on the merits.

Judgment reversed with direction. All the Justices concur except, Mobley, C. J., Grice, P. J., and Nichols J., who dissent from the judgment of reversal.

ARGUED MARCH 12, 1973 — DECIDED MAY 24, 1973.

Certiorari to the Court of Appeals of Georgia — 127 Ga. App. 593 (194 SE2d 508).

Mitchell, Mitchell, Coppedge & Boyett, Warren N. Coppedge, Jr., for appellant.

McCamy, Minor, Phillips & Tuggle, Pittman, Kinney, Kemp, Pickell & Avrett, for appellees.

APPENDIX E

47070. NORTH GEORGIA FINISHING, INC. v. DI-CHEM, INC. et al.

PANNELL, Judge, Di-Chem, Inc., brought an action against North Georgia Finishing, Inc., seeking a judgment in the amount of $51,279.17, and upon affidavit of plaintiff that said action was pending and that it "had reason to apprehend the loss of said sum, or some part thereof, unless process of garnishment issues," summons of garnishment issued and was served upon the bank in which defendant had its bank account. Three days later defendant gave bond to dissolve the garnishment, and subsequently made a motion to dismiss the garnishment, the only grounds of which, argued on this appeal, read as follows: "1. Said garnishment was issued under the authority of Georgia Code Annotated § 46-101, a code section which has been expressly held unconstitutional as violative of due process. 2. Said procedure is unconstitutional in that it is violative of the defendant's due process and equal protection rights guaranteed him by the Constitution of the United States and the Constitution of the State of Georgia." The motion was overruled, with proper certificate for review and an appeal was entered in this court. Contained in the record is the following certificate of the trial judge: "The court, at said hearing, considered the pleadings of record in said case and entertained argument of counsel. The pleadings of record raised generally the issue of constitutional due process, but did not specifically raise the due process issues of notice and hearing; however, during argument of counsel certain cases were cited as authority by counsel for both

parties and the court's attention was specifically directed to the constitutional due process issues of notice and prior hearing as the same pertain to the facts of the instant case. Among the cases cited were: (a) Sniadach v. Family Finance Corporation of Bay View, 395 U. S. 337 (1969); (b) Reeves v. Motor Contract Company, 324 FSupp. 1011 (1971); and (c) American Olean Tile Company v. Ralph E. Zimmerman, Jr., 317 FSupp. 150 (1970). Counsel for the plaintiff-appellee made no objection concerning the issues of hearing and notice as same are raised in the above mentioned cases on the grounds that said issues had not been raised by the defendant-appellant's motion to dismiss. After hearing argument of counsel, the court entered an order overruling the defendant-appellant's motion to dismiss the process of garnishment on each and every ground therein and within ten days thereafter the court certified the questions for appeal." *Held:*

The record on appeal is insufficient to identify the statute attacked as unconstitutional. The statute is identified only as a Section of Ga. Code Annotated, published by the Harrison Company. This is not sufficient. *Morgan v. Todd,* 214 Ga. 497, 499 (106 SE2d 37); *Bowen v. State,* 215 Ga. 471, 472 (111 SE2d 44); *Holmes v. State,* 224 Ga. 553, 557 (163 SE2d 803); *Widemon v. Burson,* 224 Ga. 665 (164 SE2d 128); *Turk v. State Highway Dept.,* 226 Ga. 245, 246 (174 SE2d 791). Nor does the record on appeal sufficiently identify the particular paragraph, section or article of the Federal or State Constitution of which the statute or procedure is claimed to be violative. *Webb v. Echols,* 211 Ga. 724 (88 SE2d 625); *Lanier v. Suttles,* 212 Ga. 154 (91 SE2d 21); *Pate v. Brock,* 212 Ga. 812 (96 SE2d 253); *Prince v. Thompson,* 215 Ga. 860, 861 (113 SE2d 772);

Ledford v. J. M. Muse Corp., 224 Ga. 617 (163 SE2d 815); *Herring v. R. L. Mathis Certified Dairy Co.,* 225 Ga. 653 (171 SE2d 124). See also *Walker v. Hall,* 226 Ga. 68, 69 (172 SE2d 411); *Tant v. State,* 226 Ga. 761 (177 SE2d 484); *Stroud v. Stroud,* 226 Ga. 769 (177 SE2d 574) and *Taylor v. Moultrie Tobacco Sales Board,* 227 Ga. 384, 385 (180 SE2d 737). We are bound by these decisions of the Supreme Court and only the Supreme Court can change these rulings. Further, the dissenting opinion is based upon alleged changes in the rules here applied made by the Civil Practice Act and the Appellate Practice Act. A goodly portion of the Supreme Court's decisions above cited were decided since passage of those Acts. We find nothing in the Civil Practice Act which changes the rules which we have set forth. This opinion, as such, does not deal with any "archaic form of pleading," but deals with the fact that the record, consisting partly of pleadings and partly of a motion, fails to disclose a proper constitutional attack upon any statute or that the trial judge passed upon any such constitutional attack if made.

The dissent relies on the application of rules applicable to "notice pleadings" and seeks to apply this to a motion to dismiss *which is not a pleading.* Motions are required to "state with particularity the grounds therefor. . . ." Section 7 (b) (1) of the Civil Practice Act *(Code Ann.* § 81A-107 (b) (1)). Paragraph (2) of this Section provides that rules applicable to captions, signing, and other matters of form of pleadings apply to all motions. This does not do away with the requirement stated in paragraph (1) as to particularity. Bigelow v. RKO Radio Pictures, 16 FRD 15, 17 (20 FR Serv. 13, 15). In that case it was said "Is the motion a pleading? The explicit language of Rule 7 (a) with reference to pleadings, and of Rule 7 (b) with reference to motions,

must cause this question to be answered in the negative. A motion is not a pleading. Moore's Federal Practice, Vol. 1, p. 1511 (2d Ed.). See also Johnson & Gould v. Joseph Schlitz Brewing Co., D. C. Tenn., 28 FSupp. 650." In United States v. 64.88 Acres of Land, 25 FRD 88, 90 (3 FR Serv. 2d 7(b).2), it was said: "On the subject of the requirements of Rule 7(b), in the Eastern District, an experienced trial judge in United States v. Krasnov, D. C., 143 FSupp. 184, 196 said 'I do not consider this rule to establish a mere technical requirement but rather hold it to be real and substantial.' In this connection it is interesting to note that Judge Igoe of Illinois in Bigelow v. RKO Radio Pictures, D. C., 16 FRD 15, in examining Rule 7 (a) which refers to pleadings and Rule 7 (b) which refers to motions, concludes that a motion is not a pleading. On this general proposition Barron & Holtzoff, Vol. 1, p. 405, in referring to the requirement of particularity says that the 'requirements are mandatory; compliance is essential to orderly procedure; . . .' "

Even should we assume that under a motion to dismiss for "failure to state a claim" (although there is no such motion here) constitutional questions could be raised by oral argument (see *Waters v. State*, 226 Ga. 278 (174 SE2d 420)) the *record on appeal* must show that such question *was properly raised* (as required by the cases cited) and also that such question was ruled upon by the trial judge. Neither appears here. Neither the motion nor the certificate of the trial judge shows (1) what statute was involved in the alleged constitutional attack or (2) what specific constitutional provisions, either Federal or State, were involved, nor did it show (3) that the trial judge ruled the alleged statute was or was not constitutional.

It might also be well to note that this case was transferred to this court by the Supreme Court, without opinion.

Accordingly, we must affirm the trial judge in overruling the motion to dismiss the garnishment.

Judgment affirmed. Eberhardt, P. J., Quillian, Evans and Clark, JJ., concur. Bell, C. J., Hall, P. J., Deen and Stolz, JJ., dissent.

SUBMITTED APRIL 7, 1972—DECIDED OCTOBER 26, 1972—REHEARING DENIED NOVEMBER 21, 1972—CERT. APPLIED FOR.

Garnishment. Whitfield Superior Court. Before Judge Vining.

Mitchell, Mitchell, Coppedge & Boyett, Samuel J. Brantley, for appellant.

Pittman, Kinney, Kemp, Pickell & Avrett, H. E. Kinney, for appellees.

HALL, Presiding Judge, dissenting. The majority opinion does not reach the merits of the appeal. It affirms the judgment upon the *ratio decidendi* of Supreme Court opinions that predate the CPA. It also cites Supreme Court decisions that postdate the CPA, but these are either memorandum decisions or summary opinions on the point which merely cite pre-CPA decisions for their authority. It appears that neither appellate court has ever squarely considered the question of the effect of the CPA on pleading a constitutional question. "The doctrine of stare decisis cannot be invoked to sustain, as authority, a decision which is in conflict . . . with

a previous statutory enactment to which the decision makes no reference, and which is made without reviewing or construing the statute, and in such a case the statute should be followed rather than the decision." 21 CJS 325-326, Courts, § 193. "Where previous decisions of this court are in conflict with a previous statutory enactment, to which no reference is made, such decisions will be rejected as authority, without the formality of reviewing and overruling them. 'It being a choice between the Act of the legislature and a subsequently conflicting decision of the court, the Act of the legislature speaks with imperative and controlling authority and must be followed in preference to the judicial utterance in conflict therewith.' *Central of Ga. R. Co. v. Jones,* 28 Ga. App. 258, 261 (110 SE 914)." *Murphy v. Harding,* 220 Ga. 634, 636 (140 SE2d 852). The *Jones* case by this court involved a similar issue—a statute liberalizing the procedural requirements for an assignment of error.

Prior to the CPA it was said: "Probably no phase of pleading in Georgia is fraught with more technicalities than with respect to raising constitutional issues." Georgia Procedure and Practice 38, § 2-23 (1957 Ed.). The question here is whether this archaic form of pleading is applicable under the CPA. In my opinion, it is not.

The Constitution of 1945 provides that "The General Assembly may provide for carrying cases or certain classes of cases to the Supreme Court and the Court of Appeals from the trial courts otherwise than by writ of error, and may prescribe conditions as to the right of a party litigant to have his case reviewed by the Supreme Court or Court of Appeals." *Code Ann.* § 2-3704.

It is common knowledge that our appellate judges differ in their view of the Appellate Practice Act of 1965

and the Civil Practice Act of 1966. These differences vary in degree and are based upon honest convictions. It must be acknowledged that these personal predilections have influenced the positions taken by the judges in cases before both appellate courts. Nevertheless, it should be emphasized that "the law on this question is not simply what the judges of this court think the law *should be*, but what the General Assembly has said it is." *Horton v. Brown,* 117 Ga. App. 47, 49 (159 SE2d 489). I respectfully submit that the intent of the General Assembly, as between deciding cases on the merits or avoiding the question by technicalities, is clear. "Analysis . . . shows that there is no gap between what they wrote and what in reason they must have meant." Woolford Realty Co. v. Rose, 286 U. S. 319, 330 (52 SC 568, 76 LE 1128).
568, 76 LE 1128).

The Appellate Practice Act of 1965, as amended, provides: "It is the intention of this law to provide a new procedure for taking cases to the Supreme Court and Court of Appeals, as authorized in the Constitution of 1945, Article VI, Section II, Paragraph IV (Georgia Code Anno., Section 2-3704), and, to that end, this law shall be liberally construed so as to bring about a decision on the merits of every case appealed, and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to herein." *Code Ann.* § 6-905.

The CPA provides: "This Title governs the procedure in all courts of record of the State of Georgia in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in section 81A-181. The provisions of this Title shall be construed to secure the just, speedy, and inexpensive determination of every action." *Code Ann.* § 81A-101.

Since the enactment of the CPA, both this court and the Supreme Court have held that we now operate under "notice pleading" and that "a petition should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Byrd v. Ford Motor Co.*, 118 Ga. App. 333 (163 SE2d 327); *Hunter v A-1 Bonding Service*, 118 Ga. App. 498 (2) (164 SE2d 246); *Harper v. DeFreitas*, 117 Ga. App. 236 (1) (160 SE2d 260); *Bourn v. Herring*, 225 Ga. 67 (3) (166 SE2d 89). All that a motion to dismiss must formally state is that the petition "fails to state a claim." The same principle was applied in *Benefield v. Malone*, 110 Ga. App. 607 (139 SE2d 500) with respect to a motion for summary judgment (overruling *Suggs v. Brotherhood of Locomotive Firemen &c,. 104 Ga. App.* 219, 223 (121 SE2d 661)).

As stated above, the CPA governs "all courts of record" and "all suits of civil nature." It is therefore axiomatic that it covers the manner of pleading this constitutional issue.

The old rules of pleading used two technicalities to avoid constitutional questions: a statute could not be identified by citing a section of Ga. Code Annotated, published by the Harrison Company; and the pleader had to specifically identify the particular paragraph, section or article of the Federal or State Constitution of which the statute or procedure is claimed to be violative. These technicalities are not only in direct conflict with the CPA and the Appellate Practice Act but are also anomalous. By what logic can an appellate court use the Ga. Code Annotated for formal citation in its printed opinions which are permanent, official State records and at the same time deny its use to a party litigant in typewritten

papers under a system of "notice" pleading. As for identifying constitutional provisions, a similar strict and word-perfect requirement was once necessary in objecting to the charge of the court. However, in a recent case interpreting the Appellate Practice Act, this court said that "the statute does not demand a formalistic, technically perfect objection. The only requirement is that the grounds of the objection be stated distinctly enough for a 'reasonable' trial judge to understand its nature, enabling him to rule intelligently on the specific point. In other words, it is merely a rule of common sense." *Horton v. Ammons*, 125 Ga. App. 69, 72 (186 SE2d 469), affirmed *Smith v. Ammons*, 228 Ga. 855 (188 SE2d 866). The same reasoning applies to pleading a constitutional issue. The question is whether the pleadings give fair notice to the opposite party and enable a "reasonable" trial or appellate judge to understand the issue presented? In my opinion, the appellant's motion to dismiss meets this test. It points out that the cited Code section *(Code Ann.* § 46-101) has been held unconstitutional as violative of due process and that the procedure used violates the due process and equal protection rights guaranteed by the Constitution of the United States and the Constitution of the State of Georgia. The trial judge recited in his order that the argument before him was specifically directed to the constitutional due process issues of notice and prior hearing as they apply to the facts in this case. He cited what he considered to be the applicable precedents and ruled on the merits of the case. An important constitutional issue is now before this court. We do not have the right to avoid deciding it on the merits by invoking a technical rule of pleading which has been superseded.

I am authorized to state that Chief Judge Bell and Judges Deen and Stolz concur in this dissent.

APPENDIX F

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta
February 1, 1972
Number 6827

Dear Sir:

The record in the case of
North Georgia Finishing, Inc.

VS.

Di-Chem, Inc., et al

has this day been received and filed in this office, and transferred to the Court of Appeals.

Yours very truly,

Mrs. Joline B. Williams, Clerk

73-1121

Supreme Court, U. S.
FILED
FEB 23 1974
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

PETITIONER'S SUPPLEMENTAL BRIEF
TO

PETITION FOR CERTIORARI

BY

NORTH GEORGIA FINISHING, INC., Petitioner

V.

DI-CHEM, INC., Appellee

THE FIRST NATIONAL BANK
OF DALTON, Garnishee

from

SUPREME COURT OF THE STATE OF GEORGIA

IN ITS CASE NO. 28,217

Warren N. Coppedge, Jr.
Nathaniel Hansford
MITCHELL, MITCHELL, COPPEDGE & BOYETT
101 NORTH THORNTON AVENUE
DALTON, GEORGIA 30720

ATTORNEYS FOR PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D. C.

PETITIONER'S SUPPLEMENTAL BRIEF

TO

PETITION FOR CERTIORARI

On the 17th day of January, 1974, North Georgia Finishing, Inc. filed a writ of certiorari to the Supreme Court of the United States to submit for review and reversal the opinion and decision of the Supreme Court of the State of Georgia entered October 25, 1973, in its Case Number 28217, entitled North Georgia Finishing, Inc., Appellant v. Di-Chem, Inc., Appellee; First National Bank of Dalton, Garnishee.

In the interval between filing the above petition and this date a decision of great import has been rendered by a Three-Judge Court in the Northern District of Georgia styled *Morrow Electric Co., Inc. v. Harold R. Cruse, et al,* Civil Action 19008. The decision of that Court was published on January 28, 1974 and is an intervening matter not available at the time of the filing of the petition for writ of certiorari. This Supplemental Brief is submitted pursuant to Rule 24 (5). A certified copy of *Morrow Electric Co., Inc. v. Harold Cruse, et al,* is attached hereto as Appendix A.

SUPPLEMENTAL BRIEF

On January 28, 1974, a United States Three Judge Court sitting in the Northern District of Georgia rendered a decision as to the constitutionality of the Georgia statutory garnishment scheme as set out at Georgia Code Annotated § 46-101, 46-102, and 46-401. In that case, *Morrow Electric Co., Inc. v. Harold R. Cruse, et al,* Civil Action 19008 (N.D. Ga.), the Court specifically ruled that the provision of the Georgia Code which permit prejudgment garnishment are unconstitutional in that they violate the Fourteenth Amendment by depriving plaintiff of property without due process of law. The Court relied upon the decisions of the United States Supreme Court in *Sniadach v. Family Finance,* 395 U. S. 337 (1969) and *Fuentes v. Shevin,* 407 U. S. 67 (1972) in reaching its conclusion.

In *Morrow Electric Co.,* (supra) the Court had before it the question of garnishment of a bank account under the Georgia garnishment statutes. It determined that since the ruling in *Fuentes* (supra) the type of property seized is no longer relevant to a determination of whether due process rights should obtain. Observing the similarity between the case in which its decision was reached and the petitioner's case of *North Georgia Finishing, Inc., v. Di-Chem, Inc.,* 231 Ga. 260, the Court stated that it disagreed with the Supreme Court of Georgia's decision in *North Georgia Finishing, Inc.* (supra) and construed the clear import of *Fuentes* (supra) to leave no other choice but to reach such a conclusion. Moreover, it was specifically noted that the Supreme Court of Georgia failed to refer to the *Fuentes* (supra) case in its opinion in *North*

Georgia Finishing, Inc. (supra).

MITCHELL, MITCHELL, COPPEDGE & BOYETT

BY: /s/ Warren N. Coppedge, Jr.

Warren N. Coppedge, Jr.
Nathaniel Hansford

ATTORNEYS FOR PETITIONER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MORROW ELECTRIC CO., INC.

VS.

HAROLD R. CRUSE, ET AL.

CIVIL ACTION

NO. 19008

Before BELL, Circuit Judge, and EDENFIELD and FREEMAN, District Judges

ORDER

FREEMAN, District Judge:

This is a civil rights action brought by a corporate plaintiff under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343 (3), to declare unconstitutional and enjoin the enforcement of the Georgia statutory garnishment scheme as set out at Ga. Code Ann. §§46-101, 46-102, and 46-401. (See Appendix). Plaintiff contends that this scheme violates the Due Process Clause of the Fourteenth Amendment because it has effectively deprived plaintiff of the use of its property—

specifically, a bank account set aside for payment of state and federal employee withholding taxes—without prior notice or an opportunity for a prior hearing. Plaintiff has also requested actual and punitive damages against all defendants. As the complaint seeks to enjoin the defendant Joe B. Mundy, in his capacity as Clerk of the State Court of Clayton County, Georgia, from enforcing these provisions, a three-judge court has been convened in accordance with 28 U.S.C. §2281. A hearing before this court on plaintiff's motion for a preliminary and permanent injunction was held on November 26, 1973. That motion is presently before the court. After today's order, the only matter remaining for consideration will be the issue of damages.

FACTUAL BACKGROUND

The basic facts in this action are not in dispute. The defendant Harold R. Cruse, d/b/a Southwest Electric Supply Co. (hereinafter "Cruse") is in the business of supplying contractors with various construction materials. Plaintiff Morrow Electric Company, Inc. (hereinafter "Morrow") is a Georgia corporation in the electrical contracting business. On July 30, 1973, the defendant Cruse filed a civil action against Morrow in the State Court of Clayton County, Georgia, to recover an alleged debt of $12,755.17 for goods and services rendered. On August 2, Cruse and the Insurance Company of North America (not a party to this action) executed a Bond for Garnishment, pursuant to Ga. Code Ann. §46-102. On August 8, defendant G. Roger Land, Cruse's attorney, executed an affidavit before the Deputy Clerk, Superior Court of Fulton County, which stated the amount of Morrow's alleged indebtedness to Cruse (including an amount for attorney

fees), and referred to the pendency of the action in the State Court of Clayton County. Both the bond and affidavit were prepared on a standard form provided by the State Court of Clayton County.

On August 9, agents of the defendant Joe B. Mundy, Clerk of the State Court of Clayton County, served summons of garnishment upon the Bank of Forest Park, 1066 Main Street, Forest Park, Georgia, at which plaintiff maintains an account. The bank in turn notified plaintiff that its account had been garnished, and on September 11 paid $15,028.17 into the registry of the State Court of Clayton County. This sum had been deposited by plaintiff to pay, among other things, various federal and state employment taxes. Checks previously written on this fund which had been sent to the appropriate revenue agencies were consequently returned for insufficient funds. Plaintiff does not have additional funds with which to pay its tax liabilities or to obtain the collateral required by Ga. Code Ann. §46-401 to dissolve the garnishment. As a consequence, its operating assets are subject to seizure by the United States or the State of Georgia.

THE STATUTORY GARNISHMENT SCHEME

Subject to some qualification, the Georgia statutory garnishment scheme under attack is summarized as follows. The process of garnishment is available as a remedy to a plaintiff in a pending civil action. Ga. Code Ann. §46-101. In order to use this process, the plaintiff or his attorney must make an affidavit "before some officer authorized to issue an attachment" stating the amount allegedly due and his belief that unless garnishment issues, the sum will be lost. In addition, he must furnish a

secured bond payable to the defendant in the pending action equal to double the amount of the claimed indebtedness. The purpose of the bond is to indemnify the defendant for damages resulting from the garnishment if plaintiff eventually loses the pending action or the money was not subject to garnishment. Ga. Code Ann. §46-102. The defendant may dissolve the garnishment by filing a secured bond payable to the plaintiff and conditioned on the payment of any judgment in plaintiff's favor. Ga. Code Ann. §46-401.

THE CONSTITUTIONAL ISSUE

Plaintiff has based its case upon *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972). When read together, these two cases set forth a constitutional requirement that if due process standards are to be met, notice and hearing, aimed at establishing the probable validity of the creditor's claim, must be afforded the alleged debtor before he is deprived of the use of his property. See, *Mason v. Garris* and *Allen v. Rosser*, consolidated at 360 F. Supp. 420, 423 (N.D. Ga. June 21, 1973) (three-judge court). The *Sniadach* and *Fuentes* courts recognized that in certain "extraordinary situations" postponement of notice and an opportunity for a hearing would be justified, but required that the statute authorizing such summary seizure be "narrowly drawn" to meet those unusual circumstances. *Sniadach v. Family Finance Corp., supra*, at 339; *Fuentes v. Shevin, supra*, at 90-93.

In addition, *Fuentes* also partially answered the question left open in *Sniadach* as to what types of property were entitled to due process protection. *Sniadach* had

involved pre-judgment garnishment of wages, and there was some doubt as to whether its holding was limited to such specialized types of property as wages. The *Fuentes* court refused to read *Sniadach* so narrowly, and concluded:

> No doubt, there may be many gradations in the "importance" or necessity of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally.

407 U. S. at 89-90. Although *Fuentes* itself involved the seizure of such items as a stove and a stereo, the thrust of its reasoning does not stop at consumer goods and would appear to extend to any property interest which cannot be considered *de minimus*.

The present case involves the garnishment of a bank account maintained by a corporate employer to pay the state and federal withholding and F.I.C.A. taxes of its employees. The Georgia statutes which authorize garnishment of bank accounts have previously come under attack in this district. In *Aaron v. Clark*, 342 F. Supp. 898 (N.D. Ga., May 4, 1973), a three-judge court held unconstitutional those provisions of Ga. Code Ann. §§46-101 and 46-102 which permitted pre-judgment garnishment of funds set aside in a bank account for college tuition. The court, citing *Sniadach*, was quite careful to limit its holding to the type of funds deposited in the bank account—that is, money for college tuition—because such funds were a specialized type of property whose

deprivation would impose a great hardship on the alleged debtor. The court held the garnishment of such funds to be unconstitutional because the statutes provided no opportunity for prior notice and hearing, and did not restrict their summary seizure to extraordinary situations. In addition, the court concluded that the availability to the debtor of a bond to dissolve the garnishment, pursuant to Ga. Code Ann. §46-402, was not a substitute for prior notice and an opportunity to be heard.

Aaron v. Clark was decided a month before *Fuentes*. It is clear that the only factor that prevented the three-judge court from declaring sections 46-101 and 46-102 to be unconstitutional as they relate to all pre-judgment garnishments was the type of property interest involved. Since *Fuentes*, this type of analysis is unwarranted, because the type of property seized is no longer relevant to a determination of whether due process rights should obtain.

Defendants nevertheless argue that *Fuentes* should not apply in a more commercial setting, where creditor and debtor normally bargain from more equal positions, and where there is a substantial risk that the corporate debtor may be dissolved in an attempt to avoid payment of any judgment rendered against it. Defendants contend that plaintiff's inability to post a dissolution bond indicates that it is on the verge of financial collapse and urge that the facts of this case are sufficiently extraordinary as to warrant an exception to the due process requirement of notice and hearing.

The court feels that this argument is without merit because, as noted above, both *Sniadach* and *Fuentes* require that the statute authorizing summary seizure be

narrowly drawn to meet extraordinary situations, regardless of whether the facts of a particular case are extraordinary. As noted by the court in *Aaron v. Clark, supra,* sections 46-101 and 46-102 are not so narrowly drawn. Furthermore, it is not clear that all the equities in this case are on the side of the defendants. The economic impact of even a temporary deprivation of the bank account in question could be quite severe should it result in the seizure of the plaintiff's operating assets. Moreover, it is well-settled that corporations are "persons" within the meaning of the Fourteenth Amendment and have standing to assert due process violations. See, *Grosjean v. American Press Co.,* 297 U.S. 233 (1936).

The final matter for consideration today is the contention by the State of Georgia, set forth in an amicus brief submitted to this court, that the present action is barred by the anti-injunction statute, 28 U.S.C. §2283. This argument was duly considered and rejected by this court's order of November 16, 1973, on the grounds that a civil rights action under 42 U.S.C. §1983 was an exception to the anti-injunction statute. In its November 16 order, the court denied defendants' motion to dismiss or stay in deference to an authoritative state court interpretation of the statutes in question. It now appears that such an authoritative interpretation has been rendered in *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 231 Ga. 260 (October 4, 1973), thereby vitiating any argument urging abstention in favor of the state courts.

In *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra,* the Georgia Supreme Court interpreted the garnishment statutes and upheld pre-judgment garnishment as constitutional. Without referring to *Fuentes,* the Court reasoned that *Sniadach* "did nothing more than carve out

an exception for wage earners from what the court deemed to be otherwise lawful prejudgment seizures, i.e., that garnishment of wages was a limited exception to the general rule of legality of garnishment statutes." 231 Ga. at 263-264. Although we are reluctant to disagree with our brethren on the Supreme Court of Georgia, the clear import of *Fuentes* leaves us with no other choice but to reach a contrary conclusion.

Accordingly, we hereby DECLARE that those provisions of Ga. Code Ann. §§46-101, 46-102, and 46-401 which permit pre-judgment garnishment are unconstitutional in that they violate the Fourteenth Amendment by depriving plaintiff of property without due process of law. Defendants are therefore permanently ENJOINED from implementing or enforcing in any manner those provisions of Ga. Code Ann. §§46-101, 46-102 and 46-401, which permit pre-judgment garnishment.

Should plaintiff desire to pursue further its prayer for damages, it is directed to do so by filing with Judge Freeman's court its Notice of Intention within fifteen (15) days of this order.

IT IS SO ORDERED.

This, the 28 day of January, 1973.

s/Griffin B. Bell
GRIFFIN B. BELL
UNITED STATES CIRCUIT JUDGE

s/ Newell Edenfield
NEWELL EDENFIELD
UNITED STATES DISTRICT JUDGE

s/ Richard C. Freeman
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

APPENDIX

46-101. Right to writ; wages exempt until after final judgment.

In cases where suit shall be pending, or judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly or monthly wages of any person residing in this State until after final judgment shall have been had against said defendant: Provided, further, that the wages of a share cropper shall also be exempt from garnishment until after final judgment shall have been had against said share cropper: Provided, further, that nothing in this section shall be construed as abridging the right of garnishment in attachment before judgment is obtained. (Act 1882, Cobb, 77. Acts 1855-6, p. 36; 1933, p. 35; 1952, p. 153.)

46-102. Affidavit; necessity and contents. Bond.

The plaintiff, his agent, or attorney at law shall make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action, or on such judgment, and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue, and shall give bond, with good security, in a sum at least equal to double the amount sworn to be due, payable to the defendant in the suit or judgment, as the case may be, conditioned to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment, in the

event that the plaintiff shall fail to recover in the suit, or it shall appear that the amount sworn to be due on such judgment was not due, or that the property or money sought to be garnished was not subject to process of garnishment. No person shall be taken as security on the bond who is an attorney for the plaintiff or a nonresident unless the nonresident is possessed of real estate in the county where the garnishment issues of the value of the amount of such bond. (Act 1822, Cobb, 77. Acts 1855-6, p. 36; 1873, p. 29; 1884-5, p. 54; 1964, p. 220.)

46-401. Dissolution of garnishments; bond; judgment on bond.

When garnishment shall have been issued, the defendant may dissolve such garnishment upon filing in the clerk's office of the court, or with the justice of the peace, where suit is pending or judgment was obtained, a bond with good security, payable to the plaintiff, conditioned for the payment of any judgment that shall be rendered on said garnishment. The plaintiff may enter up judgment upon such bond against the principal and securities, as judgment may be entered against securities upon appeal, whenever said plaintiff shall obtain the judgment of the court against the property or funds against which garnishment shall have been issued. (Acts 1884-5, p. 96.)

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA } *ss:*

ATLANTA DIVISION

I, BEN H. CARTER, Clerk of the United States District Court for the NORTHERN District of GEORGIA, do hereby certify that the annexed and foregoing is a true and full copy of the original Three Judge Order filed on January 28, 1974 in Civil Action No. 19008 (MORROW ELECTRIC CO., INC. -vs- HAROLD R. CRUSE, et al).

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Atlanta, Georgia this 15th day of February, A. D. 1974

BEN H. CARTER

Clerk.

By /s/ Lorraine Nalting

Deputy Clerk.

Supreme Court, U. S.
FILED
JUL 11 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1121

NORTH GEORGIA FINISHING, INC., *Petitioner*

V.

DI-CHEM, INC., *Respondent*

On Writ of Certiorari to the United States Supreme Court

Petition for Certiorari Filed January 17, 1974

Certiorari Granted May 28, 1974

THE SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

INDEX OF SINGLE APPENDIX

1. Affidavit and Bond for Garnishment Dated August 20, 1971; Filed August 20, 1971 ..Page 3

2. Summons of Garnishment dated August 20, 1971 .....Page 6

3. Return of Service entered August 20, 1971 .....Page 8

4. Bond of North Georgia Finishing, Inc., and Security Dated August 23, 1971; Filed August 23, 1971 .....Page 9

5. Judgment Dissolving Garnishment, Dated August 23, 1971; Filed August 23, 1971 .....Page 10

6. Motion to Dismiss Writ of Garnishment with Notice thereon, Filed September 15, 1971 .....Page 11

7. Order on Motion to Dismiss Writ of Garnishment, Entered November 29, 1971 .....Page 13

8. Order on Motion of Defendent to Dismiss Writ of Garnishment (Certificate of Trial Court for Immediate Review), Entered December 3, 1971; Filed December 3, 1971 .....Page 14

9. Motion to Include Supplemental Record on Appeal, Filed March 24, 1972 .....Page 16

10. Supplemental Record on Appeal with Certificate of Court and Consent of Counsel ....Page 18

11. Order of Trial Court on Supplemental Record, Entered March 28, 1972; Filed March 29, 1972 ..Page 20

12. Certificate of Clerk of Court on Supplemental Record Entered March 30, 1972 .....Page 22

13. Order of Transfer from Supreme Court of Georgia to the Court of Appeals of Georgia, Appendix F to printed Petition for Certiorari, p. 36 (February 1, 1972) .....Page 23

14. Opinion of the Court of Appeals of Georgia, Appendix E to printed Petition for Certiorari, p. 31 (October 26, 1972) .....Page 23

15. Writ of Certiorari to the Georgia Court of Appeals from the Supreme Court of Georgia, Appendix D to printed Petition for Certiorari, p. 26 (May 24, 1973) .....Page 23

16. Order of Transfer from Court of Appeals of Georgia to the Supreme Court of Georgia, Appendix C to printed Petition for Certiorari, p. 25 (July 9, 1973) .....Page 23

17. Decision of the Supreme Court of Georgia, Appendix B to printed Petition for Certiorari, p. 13 (October 4, 1973) .....Page 23

18. Order of Supreme Court of Georgia Denying Motion for Rehearing, Appendix A to printed Petition for Certiorari, p. 12 (October 25, 1973) .....Page 23

1. *Affidavit and Bond for Garnishment*

NO. 6827

SUPERIOR COURT OF

WHITFIELD COUNTY

AFFIDAVIT AND BOND FOR GARNISHMENT

DI-CHEM, INC., Plaintiff

V.

NORTH GEORGIA FINISHING, INC., Defendant

FIRST NATIONAL BANK OF DALTON, Garnishee

Filed in Office, this 8/20/71

DUAL BROADRICK, Clerk

H. E. KINNEY, Plaintiff's Attorney

SUPERIOR COURT OF *Whitfield* COUNTY

GEORGIA, *Whitfield* COUNTY.

Personally appeared *R. L. Foster, President of Di-Chem, Inc.*, who on oath says that he is *President of Di-Chem, Inc.*, plaintiff herein and that *North Georgia Finishing, Inc.* de-

fendant, is indebted to said plaintiff in the sum of $51,279.17 DOLLARS, principal, $_____, interest, $_____ attorney's fees, and $_____ cost and that said plaintiff has—a suit pending—*returnable to the* Superior Court of *Whitfield* County, and that affiant has reason to apprehend the loss of said sum or some part thereof unless process of Garnishment issues.

Sworn to and subscribed before me,
this *August* 20, 1971

/s/ R. L. Foster, Affiant.

/s/ Dual Broadrick, Clerk
Superior Court of *Whitfield* County.

* (Italics indicate typewritten or manuscript, all other material printed form.)

GEORGIA, *Whitfield* COUNTY.

The plaintiff named in the foregoing affidavit, as principal, and the undersigned as security, jointly and severally are bound unto the defendant named in the foregoing affidavit in the sum at least equal to double the amount sworn to be due in said affidavit, subject to the following conditions:

The said Plaintiff as principal has sued out process of Garnishment upon—suit pending—in the Superior Court of *Whitfield* County against said defendant as alleged in the foregoing affidavit.

Now, should the said Plaintiff pay to the said Defendant all costs and damages that may be sustained by the said Defendant in consequence of suing said Garnishment in the event that Plaintiff fail to recover in said suit or in the event the amount sworn to be due on said judgment is not due, and in the event that the property or money sought to be garnished is not subject to garnishment process, then this Bond to be void.

Witness our hand and seal this 19 day of *August,* 1971.

DI-CHEM, INC.

BY: */s/ R. L. Foster, Pres.* (SEAL)
/s/ R. L. Foster, Security (SEAL)

Approved:

/s/ Dual Broadrick, Clerk

/s/ Smith Foster, Security
/s/ Bennie Albertson, Security

* (Italics indicate typewritten or manuscript, all other material printed form.)

2. *Summons of Garnishment*

SUPERIOR COURT OF WHITFIELD COUNTY

(Title omitted in printing)

GEORGIA, *Whitfield* COUNTY. NO. 6827

TO: *The First National Bank of Dalton*, Garnishee
Hamilton Street
Dalton, Georgia
Address

YOU ARE HEREBY REQUIRED to appear at the Superior Court of *Whitfield* County, No sooner Than Thirty (30) days, and No Later Than Forty-Five (45) Days After Date of Service, and in writing make your Answer of Garnishment, in which you state what property, money or effects you had in your hands at the date of service of this Summons, belonging to the defendant in the case of

Di-Chem, Inc.

versus

North Georgia Finishing, Inc.

AND also state what property, money or effects of the said Defendant have come into your hands between the time of the service of this Summons, and the time of making your Answer; and what you owed the Defendant at the date of the service of this Summons, and what amount you have

become indebted to the Defendant since the service of this summons.

Witness the Honorable *Robert L. Vining, Jr.*, Judge of said Court.

This *August* 20, 1971.

/s/ Dual Broadrick
Clerk, Superior Court of *Whitfield* County

* (Italics indicate typewritten or manuscript, all other material printed form.)

3. *Return of Service*

SUPERIOR COURT OF WHITFIELD COUNTY

(Title omitted in printing)

GEORGIA, *Whitfield* COUNTY.

I have this day served summons of garnishment issued upon within affidavit and bond on *The First National Bank of Dalton* by serving the same on *Mr. Allgood* its *agent* and personally in charge of the office and place of business at the time of service of said garnishee in *Dalton, Ga.*, said County, at _____ o'clock, __M.

This the 20*th* day of *August*, 1971.

/s/ G. L. Schneider, D.M.
Superior Court of *Whitfield* County.

* (Italics indicate typewritten or manuscript, all other material printed form.)

4. *Bond and Security of North Georgia Finishing, Inc.*

SUPERIOR COURT OF WHITFIELD COUNTY

(Title omitted in printing.)

Know all men by these presents, that NORTH GEORGIA FINISHING, INC., principal, and the undersigned security, are bound unto DI-CHEM, INC., plaintiff, in a sum of dollars equivalent to whatever final judgment the plaintiff may obtain against the defendant, if any, but not to exceed the sum of $51,279.17.

The condition of this obligation is such that if said principal shall pay the judgment rendered on said garnishment proceedings in said matter, then this bond to be void; otherwise of full force and effect.

Witness the hands and seals of the undersigned, this 23rd day of August, 1971.

NORTH GEORGIA FINISHING, INC.
Principal
By: */s/ Daniel Mathews, V.P.*

BEAVER CREEK INDUSTRIES, INC.
Security
By: */s/ Daniel Mathews, V.P.*
/s/ Daniel Mathews

FILED IN OFFICE
WHITFIELD SUP. CRT.
AUG. 23, 1971
/s/ Dual Broadrick
Dual Broadrick, C.S.C.

5. *Judgment Dissolving Garnishment*

IN THE SUPERIOR COURT FOR THE COUNTY OF WHITFIELD, STATE OF GEORGIA

CIVIL ACTION, FILE NO. 6827

DI-CHEM, INC., :
Plaintiff :

Vs. :

NORTH GEORGIA FINISHING, INC., :
Defendant :

JUDGMENT DISCHARGING GARNISHEE ON GIVING DISSOLUTION BOND

It appearing to the Court that the defendant in the within case has filed a proper dissolution bond dissolving the within garnishment, it is thereupon considered, ordered and adjudged that said garnishee, the First National Bank of Dalton, Dalton, Georgia, be hence discharged.

THIS 23rd day of August, 1971.

/s/ Robert L. Vining, Jr.
J. S. C. C. C.

FILED IN OFFICE
WHITFIELD SUP. CRT.
AUG. 23, 1971
/s/ Dual Broadrick
Dual Broadrick, C.S.C.

6. *Motion to Dismiss Writ of Garnishment with Notice thereon*

SUPERIOR COURT OF WHITFIELD COUNTY

(Title omitted in printing.)

Comes now the defendant, NORTH GEORGIA FINISHING, INC., and moves the Court to dismiss said writ of garnishment on the following grounds and for each of the following reasons:

-1-

Said garnishment was issued under the authority of Georgia Code Annotated § 46-101, a code section which has been expressly held unconstitutional as violative of due process.

-2-

Said procedure is unconstitutional in that it is violative of the defendant's due process and equal protection rights guaranteed him by the Constitution of the United States and the Constitution of the State of Georgia.

-3-

Said plaintiff in garnishment had no reason to apprehend the loss of any part of any judgment that he might obtain against the defendant in garnishment and therefore, had no grounds upon which to base said writ or garnishment.

-4-

Said pending suit upon which said writ of garnishment was based fails to state a claim against the defendant upon

which relief can be granted.

WHEREFORE, defendant prays that this Motion to Dismiss be sustained and that plaintiff's writ of garnishment be dismissed and that the defendant's bond dissolving said garnishment also be dissolved.

MITCHELL & MITCHELL

BY: */s/ Samuel J. Brantley*
Samuel J. Brantley

ATTORNEYS FOR DEFENDANT

P. O. ADDRESS:

P. O. Box 668
Dalton, Georgia 30720
278-2040

(Notice omitted in printing)

FILED IN OFFICE
WHITFIELD SUP. CRT.
SEPT. 15, 1971
/s/ Dual Broadrick
Dual Broadrick, C.S.C.

7. Order on Motion to Dismiss Writ of Garnishment

IN THE SUPERIOR COURT FOR THE COUNTY OF WHITFIELD, STATE OF GEORGIA

CIVIL ACTION, FILE NO. 6827

DI-CHEM, INC.,	:
Plaintiff	:
Vs.	:
NORTH GEORGIA FINISHING, INC.,	:
Defendant	:
FIRST NATIONAL BANK OF DALTON,	:
Garnishee	:

ORDER

The above motion to dismiss is hereby overruled. This 29th day of November, 1971.

/s/ Robert L. Vining, Jr.
J. S. C. C. C.

8. *Order of the Court on the Motion of the Defendant to Dismiss Writ of Garnishment (Certificate of Trial Court for Immediate Review)*

IN THE SUPERIOR COURT FOR THE COUNTY OF WHITFIELD, STATE OF GEORGIA

CIVIL ACTION, FILE NO. 6827

DI-CHEM, INC., :
Plaintiff :

Vs. :

NORTH GEORGIA FINISHING, INC., :
Defendant :

ORDER OF THE COURT ON THE MOTION OF THE DEFENDANT TO DISMISS WRIT OF GARNISHMENT

This motion having come on for hearing on the 29th day of November, 1971, in the Superior Court of Whitfield County at Dalton, Georgia, it is, after argument of counsel thereon,

ORDERED, ADJUDGED AND DECREED by the Court that said Motion to Dismiss be and the same is hereby overruled on each and every ground therein.

In accordance with the provisions of Georgia Code Annotated, Section 6-701 (Supp.), the undersigned Judge of the Superior Court hearing said motion hereby certifies within ten (10) days of the entry thereof, that this order, decision and judgment overruling such motion is of such

importance to the case that an immediate re-review should be had.

THIS 3rd day of December, 1971

/s/ Robert L. Vining, Jr.
J. S. C. C. C.

(Certificate omitted in printing.)

FILED IN OFFICE
WHITFIELD SUP. CRT.
DEC. 3, 1971
/s/ Dual Broadrick
Dual Broadrick, C.S.C.

9. *Motion to Include Supplemental Record on Appeal*

SUPERIOR COURT OF WHITFIELD COUNTY

(Title omitted in printing.)

Comes now the defendant in the above styled case and moves the Court to approve the attached certificate and order same certified and forwarded to the Court of Appeals of Georgia as a supplemental record on appeal. In support of said motion, defendant shows the Court the following:

-1-

That there is presently pending in the Court of Appeals of Georgia, an appeal from the Court's ruling of 29 November, 1971, overruling defendant's motion to dismiss plaintiff's process of garnishment.

-2-

The question of raising for the first time on appeal that no notice was given to the defendant of the garnishment proceedings has been raised by plaintiff-appellee in the appeal proceedings. The attached certification is necessary to the Court of Appeals in deciding questions raised on the appeal.

-3-

The certificate supplements the records as to matters which were omitted because the hearing of said matter in this Court was not recorded and transcribed.

-4-

The certificate reflects matters which actually took place at the hearing in this Court and is intended to avoid the

waste of judicial time and efficiency and shall permit the Court of Appeals of Georgia to have a more complete record for its consideration of the appeal.

MITCHELL, MITCHELL, COPPEDGE & BOYETT

BY: */s/ Samuel J. Brantley*
Samuel J. Brantley

ATTORNEYS FOR DEFENDANT

P. O. ADDRESS:

P. O. Box 668
Dalton, Georgia 30720
278-2040

(Notice omitted in printing.)

(Certificate omitted in printing.)

FILED IN OFFICE
WHITFIELD SUP. CRT.
MAR. 24, 1972
/s/ Dual Broadrick
Dual Broadrick, C.S.C.

10. *Supplemental Record on Appeal with Certificate of Court and Consent of Counsel*

COURT OF APPEALS OF GEORGIA

NO. 47070

(Title omitted in printing.)

GEORGIA, WHITFIELD COUNTY.

On the 29th day of November, 1971, there came on for hearing in the Superior Court of Whitfield County, Georgia, before the Honorable Robert L. Vining, Jr., Judge of said Court, then and there presiding, the defendant (NORTH GEORGIA FINISHING, INC.'s) Motion to Dismiss the process of garnishment in the case of DI-CHEM, INC. VS. NORTH GEORGIA FINISHING, INC., being Case No. 6827 in said Court. (R. 8-9).

The Court, at said hearing, considered the pleadings of record in said case and entertained argument of counsel. The pleadings of record raised generally the issue of constitutional due process, but did not specifically raise the due process issues of notice and hearing, however, during argument of counsel certain cases were cited as authority by counsel for both parties and the Court's attention was specifically directed to the constitutional due process issues of notice and prior hearing as the same pertain to the facts of the instant case.

Among the cases cited were:

(a) *Sniadach v. Family Finance Corporation of Bay View, et al*, 395 U.S. 337 (1969);

(b) *Reeves v. Motor Contract Company*, 324 F. Supp.

1011 (1971); and

(c) *American Olean Tile Company v. Ralph E. Zimmerman, Jr.*, 317 F. Supp. 150 (1970).

Counsel for the plaintiff-appellee made no objection concerning the issues of hearing and notice as same are raised in the above mentioned cases on the grounds that said issues had not been raised by the defendant-appellant's motion to dismiss.

After hearing argument of counsel, the Court entered an order overruling the defendant-appellant's motion to dismiss the process of garnishment on each and every ground therein and within ten days thereafter the Court certified the questions for appeal.

The instant certification is given for the purpose of supplementing the record on appeal to the Court of Appeals of Georgia.

/s/ Robert L. Vining, Jr.
J. S. C. C. C.

The above and foregoing supplemental record on appeal is hereby consented to by counsel of record for plaintiff and defendant.

PITTMAN, KINNEY, KEMP, PICKELL & AVRETT
By: */s/ H. E. Kinney*
H. E. Kinney
ATTORNEYS FOR PLAINTIFF-APPELLEE

MITCHELL, MITCHELL, COPPEDGE & BOYETT
By: */s/ Samuel J. Brantley*
Samuel J. Brantley
ATTORNEYS FOR DEFENDANT-APPELLANT

11. *Order of Trial Court on Supplemental Record*

IN THE SUPERIOR COURT FOR THE COUNTY OF WHITFIELD, STATE OF GEORGIA

CIVIL ACTION, FILE NO. 6827

DI-CHEM, INC., :
:
Plaintiff :
:
Vs. :
:
NORTH GEORGIA FINISHING, INC., :
:
Defendant :
:
FIRST NATIONAL BANK OF DALTON, :
:
Garnishee :

ORDER

The above and foregoing motion having come on for hearing on the 27th day of March, 1972, and it appearing that certain portions of the record being material and necessary to the Court of Appeals in deciding questions raised on appeal in the instant case have been omitted from the record, and counsel for plaintiff and defendant having consented to the foregoing certificate of the trial judge,

IT IS ORDERED, ADJUDGED and DECREED that the foregoing certificate of the trial judge be certified by the Clerk of the Superior Court of Whitfield County and transmitted by said Clerk to the Clerk of the Court of Appeals of Georgia for inclusion in the record of appeal in Court of

Appeals Case No. 47070 as a supplemental record on appeal.

ENTERED this 28th day of March, 1972.

/s/ Robert L. Vining, Jr.
J. S. C. C. C.

FILED IN OFFICE
WHITFIELD SUP. CRT.
MAR. 29, 1972
/s/ Dual Broadrick
Dual Broadrick, C.S.C.

12. *Certificate of Clerk of Court on Supplemental Record*

SUPERIOR COURT OF WHITFIELD COUNTY

(Title omitted in printing.)

STATE OF GEORGIA
COUNTY of WHITFIELD

I, DUAL BROADRICK, Clerk of the Superior Court of said State and County, do hereby certify that the foregoing is the Original Supplemental Record on Appeal in Court of Appeals Case No. 47070, in the case of:

NORTH GEORGIA FINISHING, INC.

Vs.

DI-CHEM, INC.

FIRST NATIONAL BANK OF DALTON, GARNISHEE

Being Case No. 6827, November Term, 1971, Whitfield Superior Court, as same is on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, this 30 day of March, 1972.

/s/ Dual Broadrick
Dual Broadrick, Clerk
Superior Court,
Whitfield County, Georgia

13. Order of Transfer from Supreme Court of Georgia to the Court of Appeals of Georgia, Appendix F to printed Petition for Certiorari, p. 36 (February 1, 1972)

14. Opinion of the Court of Appeals of Georgia, Appendix E to printed Petition for Certiorari, p. 31 (October 26, 1972)

15. Writ of Certiorari to the Georgia Court of Appeals from the Supreme Court of Georgia, Appendix D to printed Petition for Certiorari, p. 26 (May 24, 1973)

16. Order of Transfer from Court of Appeals of Georgia to the Supreme Court of Georgia, Appendix C to printed Petition for Certiorari, p. 25 (July 9, 1973)

17. Decision of the Supreme Court of Georgia, Appendix B to printed Petition for Certiorari, p. 13 (October 4, 1973)

18. Order of Supreme Court of Georgia Denying Motion for Rehearing, Appendix A to printed Petition for Certiorari, p. 12 (October 25, 1973)

Supreme Court, U. S.
FILED
APR 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1121

NORTH GEORGIA FINISHING, INC.,
Petitioner,

versus

DI-CHEM, INC.,
Respondent,

THE FIRST NATIONAL BANK OF DALTON,
Garnishee.

On Petition for Writ of Certiorari from the Supreme Court Of The State of Georgia In Its Case No. 28,217

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

LEMUEL HUGH KEMP
100 N. Selvidge Street
Dalton, Georgia 30720

H. E. KINNEY
100 N. Selvidge Street
Dalton, Georgia 30720

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

QUESTIONS PRESENTED 2

STATEMENT OF FACTS 2

ARGUMENT AND LAW 4

CONCLUSION 10

PROOF OF SERVICE 11

TABLE OF AUTHORITIES

Cases:

American Olean Title Company v. Ralph E. Zimmerman, Jr., 317 F.Supp. 150 (1970) (Dist. Ct. Hawaii), at pp. 151, 152 8

Fuentes v. Shevin, 92 S.Ct. 1983 (1972) at pp. 1999, 2000 7

Reeves v. Motor Contract Company of Georgia, 324 F.Supp. 1011 (1971), at p. 1016 7

Roberts v. Seanor, 46 Ga. App. 5, 3 (1932) 5

Statute:

Ga. Code Title 46, Section 101 ..... 2, 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1121

NORTH GEORGIA FINISHING, INC.,
Petitioner,

versus

DI-CHEM, INC.,
Respondent,

THE FIRST NATIONAL BANK OF DALTON,
Garnishee.

On Petition for Writ of Certiorari from the Supreme Court of the State of Georgia in its Case No. 28,217

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion in question is that of NORTH GEORGIA FINISHING, INC., Appellant, v. DI-CHEM, INC., Respondent; First National Bank of Dalton, Garnishee, Case No. 28217 (pp. 13-24 Appendix to Petition for Certiorari).

JURISDICTION

Petitioner invokes jurisdiction of this Court because jurisdiction is "believed to exist" under Title 28, United States Code, Section 1257 (pp. 1 and 2 of Petition). Respondent denies that jurisdiction exists under said provision.

STATUTE INVOLVED

Georgia Code Title 46, Section 101, is alleged to be unconstitutional.

QUESTIONS PRESENTED

(1) WHETHER THERE WAS ANY GARNISHMENT PROCEEDING PENDING AT THE TIME PETITIONER ALLEGES IT ATTACKED THE CONSTITUTIONALITY OF THE GEORGIA GARNISHMENT STATUTE.

(2) WHETHER THE GEORGIA GARNISHMENT STATUTE WAS AND IS UNCONSTITUTIONAL *IN EVERY GARNISHMENT CASE* INSOFAR AS IT PROVIDES FOR THE TAKING OF PROPERTY WITHOUT PRIOR NOTICE AND HEARING.

STATEMENT OF FACTS

On August 20, 1971, the Respondent instituted this case in the Superior Court of Whitfield County, Georgia against Appellant, North Georgia Finishing, Inc.,

suing on open account for $51,279.17. North Georgia Finishing was a Georgia corporation, and a wholly owned subsidiary of a non-Georgia corporation. On August 20, 1971, Di-Chem, Inc. filed with the Clerk of the Superior Court of Whitfield County, Georgia, an Affidavit and Bond for Garnishment pursuant to Georgia Code Title 46, Sections 101 and 102. The Affidavit for Garnishment stated that Respondent had reason "to apprehend the loss of the sum of $51,279.17 unless process of garnishment issue". A bond was also filed by Respondent in double the amount sued on, agreeing to "pay all costs and damages that Appellant might sustain in consequence of suing out said garnishment in the event plaintiff failed to recover in said suit, or in the event the amount sworn to be due on said judgment is not due, and in the event that the property or money sought to be garnisheed is not subject to garnishment process". This garnishment was served on the First National Bank of Dalton on August 20, 1971. Counsel for Petitioner states in his statement of the case that the money garnisheed "constituted the payroll account" of Appellant. Such does not appear anywhere in the Record in this case. Apparently, Appellant was notified of this garnishment on August 20, August 21, or August 22, 1971, because on the 23rd day of August, 1971, Appellant posted a dissolution bond as required by law. On the 23rd of August, 1971, the Judge of Whitfield Superior Court signed the following order:

> "It appearing to the Court that the defendant in the within case has filed a proper dissolution bond dissolving the within garnishment,

it is thereupon considered, ordered and adjudged that said garnishee, the First National Bank of Dalton, Dalton, Georgia, be hence discharged.

This 23rd day of August, 1971.

/s/ Robert L. Vining, Jr.
J. S. C. C. C."

On the 15th day of September, 1971, more than twenty (20) days after Appellant filed a Dissolution Bond, discharging the Bank garnishee, the Appellant filed a Motion to Dismiss the garnishment as being unconstitutional and for other technical reasons. An order was taken from the Judge on November 29th overruling the Motion to Dismiss. The overruling of this Motion was in due course appealed to the Court of Appeals of Georgia and then certioraried to the Supreme Court of Georgia. Both Courts affirmed. The opinion of these courts are set out in full in Appellant's Petition for Certiorari.

ARGUMENT AND LAW

Certiorari should be denied in this case because the opinion of the Supreme Court of the State of Georgia is not erroneous as Petitioner has not been denied due process of law, or equal protection under the Constitution of the United States.

(1) As shown in the Statement of Facts the garnishment was served on August 20, 1971. Petitioner filed

a Dissolution Bond on August 23, 1971. The Court stated in its Order of August 23, 1971, "the defendant (now petitioner) has filed a proper dissolution bond dissolving the within garnishment." A motion was made on the 15th of September, 1971 to dissolve a garnishment which had already been dissolved by Court order some three weeks before!

The Georgia case of *Roberts v. Seanor*, 46 Ga. App. 5, 3 (1932) held:

> "The dissolution bond takes the place of the property or fund garnisheed, and is conditioned to pay whatever judgment might be obtained against the garnishee or the funds sought to be impounded."

(2) Petitioner contends that Georgia Code Title 246 (should be 46), § 101, insofar as it provides for the taking of property without prior notice and hearing through Process of Garnishment where suit shall be pending but before judgment, is unconstitutional as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. To this, we cannot agree! This is not a suit where wages or property of an individual is being garnisheed. This is a suit by one corporation against another corporation! Petitioner makes the statement that petitioner's payroll account was garnisheed. There is no evidence in the Record as to this! Respondent may well need this money for its payroll!

This counsel strongly feels that individual rights should always be protected. However, we feel that the pendulum has swung too far in favor of the debtor! Petitioner is a Georgia corporation and was wholly owned by an out-of-state corporation. Assuming Petitioner was insolvent, what was to prevent it from transferring, after notice of a hearing, all of its funds out of the state or concealing them so as to make it judgment proof? Respondent in its Affidavit for Garnishment swore "that it — has reason to apprehend the loss of said sum of $51,279.17 unless process of garnishment issue."

Counsel for Petitioner in its Motion to Dismiss the Garnishment plead:

> "Said plaintiff in garnishment had no reason to apprehend the loss of any part of any judgment that he might obtain against the defendant in garnishment, and therefore, had no grounds upon which to base said Writ of Garnishment."

The Court overruled this Motion as well as the due process objection. It can be inferred that there was a strong, valid reason for the garnishment, and that the trial court heard the reasons for Petitioner apprehending the loss of $51,279.17.

It may be true that Petitioner would be harmed by garnisheeing its bank account. Can it not be argued that Respondent would be harmed by having Petitioner withdraw or conceal its assets, and even move them

out of the State of Georgia. In this event, Respondent would suffer irreparable harm!

This Court has held in *Fuentes v. Shevin,* 92 S. Ct. 1983 (1972) at pages 1999 and 2000 that there are "extraordinary situations" that justify postponing notice and opportunity for a hearing". One is an important governmental or general public interest. Second, that there has been a special need for very prompt action. Why shouldn't a corporation have the right to garnishee to secure the payment of a just debt if it has a special need for very prompt action?

A three-judge Federal panel ruled on the Georgia garnishment statute in *Reeves v. Motor Contract Company of Georgia,* 324 F. Supp. 1011 (1971), at p. 1016 as follows:

> "We find no objection to Georgia's statutory scheme of garnishment in attachment when asserted against property other than wages; rather, it is the unusual nature of wages which inevitably forces the impecunious debtor to pay possibly excessive loan charges in order to regain his lost income. Save in truly extraordinary situations, the trend has been to afford the impoverished a pretermination hearing on the merits when the result otherwise would be to place the now financially incapacitated person in a compromising position and without hope of judicial recourse. cf., Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970). If *Sniadach* is to have

precedential value to this and other courts, then Georgia's procedure of freezing an alleged debtor's wages without the necessary rudiments of due process cannot stand."

The case of *American Olean Title Company v. Ralph E. Zimmerman, Jr.*, 317 F. Supp. 150 (1970) (Dist. Ct. Hawaii) held on pages 151 and 152 as follows:

"A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 U.S. 820, 49 S. Ct. 344, 73 L.Ed. 975, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to *all* property in its modern forms. *We deal here with wages — a specialized type of property* presenting distinct problems in our economic system. We turn then to the nature of *that* property and problems of procedural due process.'" (Emphasis added.) 395 U.S. at 340, 89 S. Ct. at 1822.

The Hawaiian Court further cited from the United States case of *McKay v. McInnes*, holding as follows:

"*McKay* was but a one sentence per curiam upon affirming the judgment of the Supreme Court of Maine, viz., McInnes v. McKay, 127 Me.110, 141 A. 699 (1928). The Maine court's opinion was a positive rejection of the view that attachment (which, as the opinion indicates, could be equated with garnishment) constitutes an unconstitutional deprivation of property without due process of the law."

The Hawaiian Court then held that the Legislature of Hawaii had had many opportunities to review the garnishment proceedings over the years. It further held as follows:

"(2) The Legislature of Hawaii has had opportunities to review the garnishment procedure many, many times over the years. Until such time as either the legislature or the Supreme Court of Hawaii changes the law in this state, this court does not feel constrained to give *Sniadach* any application to Hawaii's garnishment statute other than to the garnishment of wages.

The motion to quash the garnishment summons is denied."

The Georgia courts have held Georgia's garnishment statute to be constitutional.

We respectfully submit that for this court to hold that in *every case* prior notice and a hearing must be had is going too far! This creditor is entitled to the due process of law and the protection of the law to help to keep it from losing $51,279.17!

As this Court held in *Sniadach* — it was dealing in wages, *a specialized type of property* we strongly feel

that this court should not hold that notice and a prior hearing be had in every case. To do so would work gross injustice on this Respondent and cause it to lose its entire account.

The Supreme Court of Georgia has followed the rulings of this court and has correctly interpreted the law, and therefore, certiorari should be denied.

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied because it fails to set forth any jurisdictional grounds therefor and fails to state any meritorious grounds therefor.

Lemuel Hugh Kemp

LEMUEL HUGH KEMP
100 N. Selvidge Street
Dalton, Georgia 30720

H. E. KINNEY
100 N. Selvidge Street
Dalton, Georgia 30720
ATTORNEYS FOR
RESPONDENT

PROOF OF SERVICE

GEORGIA, WHITFIELD COUNTY.

I, LEMUEL HUGH KEMP, Attorney for Respondent, DI-CHEM, INC., in Case No. 28,217 in the Supreme Court of Georgia against North Georgia Finishing, Inc., Appellant, and First National Bank of Dalton, Garnishee, do hereby swear that on the 30 day of March, 1974, I served a copy of the foregoing Brief for Respondent In Opposition to Petition for Certiorari, by mailing a copy of the foregoing Brief to their counsel of Record, Warren N. Coppedge, Jr., Esquire, of Dalton, Georgia and J. T. MINOR, III, Esquire, McCamy, Minor, Phillips, and Tuggle, of Dalton, Georgia.

Lemuel Hugh Kemp

LEMUEL HUGH KEMP
Respondent's Attorney

Sworn to and subscribed before me this 30 day of March, 1974.

Judy Timmons

N.P., GA. STATE AT LARGE

SUPREME COURT, U. S.
FILED
JUL 11 1974
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

NO. 73-1121

NORTH GEORGIA FINISHING, INC., Petitioner

V.

DI-CHEM, INC., Respondent

THE FIRST NATIONAL BANK
OF DALTON, Garnishee

GRANT OF WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF GEORGIA
IN ITS CASE NO. 28,217

BRIEF OF PETITIONER

Warren N. Coppedge, Jr.
Nathaniel Hansford
Mitchell, Mitchell, Coppedge & Boyett
101 North Thornton Avenue
Dalton, Georgia 30720

ATTORNEYS FOR PETITIONER

THE SUPREME COURT OF THE UNITED STATES,

WASHINGTON, D. C.

PETITIONER'S BRIEF

INDEX

Part I (Rule 40 (1) (a)) Statement of the Case ....Page 2

Part II (Rule 40 (1) (b)) Statement of Jurisdiction .....Page 4

Part III (Rule 40 (1) (c)) Statement of Statutes and Constitutional Provisions Involved .....Page 5

Part IV (Rule 40 (1) (d) (1)) Statement of Question Presented .....Page 8

Part V (Rule 40 (1) (e)) Statement of Facts .....Page 9

Part VI (Rule 40 (1) (g)) Argument and Citation of Authority .....Page 12

Part VII (Rule 40 (1) (h)) Conclusion .....Page 24

Part VIII Index of Cases and Statutes Cited .....Page 25

THE SUPREME COURT OF THE UNITED STATES,

WASHINGTON, D. C.

PETITIONER'S BRIEF

PART I

(Rule 40 (1) (a))

Statement of the Case

This case is now before this Court upon the grant of a writ of certiorari to the Supreme Court of the State of Georgia to submit for review here the opinion and decision of the Supreme Court of the State of Georgia entered October 25, 1973, in its Case Number 28217, entitled NORTH GEORGIA FINISHING, INC., Appellant, V. DI-CHEM, INC., Appellee; FIRST NATIONAL BANK OF DALTON, Garnishee.

The opinion of the Georgia Supreme Court is officially reported in 231 Georgia Supreme Court Reports, Page 260, (1973). Writ of certiorari to the Georgia Court of Appeals was granted by the Georgia Supreme Court and is officially reported in 230 Georgia Supreme Court Reports, Page 623 (1973). The decision of the Court of Appeals of Georgia is officially reported in 127 Georgia Court of Appeals Reports, Page 593, (1972). This case was originally appealed from the Whitfield County Superior Court to the Supreme Court of Georgia which transferred without opinion to the Georgia

Court of Appeals. These opinions and notice of denial of rehearing and notice of transfer appear as an appendix to Petitioner's application for certiorari.

The decision of the Supreme Court of the State of Georgia hereby appealed from was rendered October 25, 1973, denying Appellant-Petitioner's Motion for Rehearing of opinion entered on October 4, 1973.

PART II

(Rule 40 (1) (b))

Statement of Jurisdiction

Jurisdiction of this Court to review this cause is believed to exist in United States Code Title 28 Section 1257.

PART III

(Rule 40 (1) (c))

Statement of Statutes and Constitutional Provisions Involved

A. Georgia Code Section 46-101

"Right to writ; wages exempt until after final judgment—In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly, or monthly wages of any person residing in this State: Provided, further, that the wages of a share cropper shall also be exempt from garnishment until after final judgment shall have been had against said share cropper: Provided, further, that nothing in this section shall be construed as abridging the right of garnishment in attachment before judgment is obtained. (Act 1882, Cobb, 77. Acts 1855-6, page 36; 1933, page 35; 1952, page 153.)"

B. Georgia Code Section 46-102

"Affidavit; necessity and contents. Bond—The plaintiff, his agent, or attorney at law shall make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action, or on such judgment, and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue, and shall give bond, with good security, in a sum at least equal to

double the amount sworn to be due, payable to the defendant in the suit or judgment, as the case may be, conditioned to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment, in the event that the plaintiff shall fail to recover in the suit, or it shall appear that the amount sworn to be due on such judgment was not due, or that the property or money sought to be garnished was not subject to process of garnishment. No person shall be taken as security on the bond who is an attorney for the plaintiff or a nonresident unless the nonresident is possessed of real estate in the county where the garnishment issues of the value of the amount of such bond. (Act 1882, Cobb, 77. Acts 1855-6, page 36; 1873, page 29; 1884-5, page 54; 1964, page 220.)"

C. Georgia Code Section 46-103

"*Affidavit by agent or attorney*—When the affidavit shall be made by the agent or attorney at law of the plaintiff, he may swear according to the best of his knowledge and belief, and may sign the name of the plaintiff to the bond, who shall be bound thereby in the same manner as though he had signed it himself. (Act 1822, Cobb, 77. Acts 1855-6, page 36.)"

D. Georgia Code Section 46-104

"*Affidavit and bond by one of firm, etc.*—When the debt for recovery of which the garnishment is sought shall be due to partners or several persons jointly, any one of said partners or joint creditors may make the affidavit and give bond in the name of the plaintiff, as prescribed in cases of attachment.

E. Georgia Code Section 46-401

"*Dissolution of garnishments; bond; judgment on bond*—When garnishment shall have been issued, the defendant may dissolve such garnishment upon filing in the clerk's office of the court, or with the justice of the peace, where suit is pending or judgment was obtained, a bond with good security, payable to the plaintiff, conditioned for the payment of any judgment that shall be rendered on said garnishment. The plaintiff may enter up judgment upon such bond against the principal and securities, as judgment may be entered against securities upon appeal, whenever said plaintiff shall obtain the judgment of the court against the property or funds against which garnishment shall have been issued. (Acts 1884-5, page 96.)"

F. United States Constitution
Amendment XIV, Section 1

"*Amendment XIV.—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.* Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (USC Amendment XIV, Section 1; Georgia Code Title 1, Section 815).

PART IV

(Rule 40 (1) (d) (1))

Statement of Question Presented

Is Georgia Code Title 46 Section 101, insofar as it provides for the taking of property without prior notice and hearing through Process of Garnishment where suit shall be pending but before judgment, unconstitutional as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

PART V

(Rule 40 (1) (e))

Statement of Facts

PREFACE

Petitioner, NORTH GEORGIA FINISHING, INC., will for brevity, be referred to hereinafter as NGF; Respondent, DI-CHEM, INC., will likewise be referred to hereinafter as DI-CHEM; and Garnishee, FIRST NATIONAL BANK OF DALTON, will be referred to as FNB DALTON. Parentheticals (# #) will refer to page number of the technical record of case Appendix A, all of which has been included by agreement of the parties.

On Friday, August 20, 1971, DI-CHEM filed Civil Action No. 8626 in the Superior Court of Whitfield County, Georgia, alleging an unverified and unliquidated open account indebtedness due and owing by NGF. This indebtedness has been and presently is in dispute. Also on August 20, 1971, immediately after filing its case in chief and prior to the service thereof or other notice of its pendency and prior to any resolution or hearing therein, DI-CHEM also filed and caused the Clerk of the Superior Court of Whitfield County, Georgia, to issue a separate garnishment action *pendente lite* naming FNB DALTON as Garnishee (A 3).

The garnishment action was instituted under the authority of the Clerk of the Superior Court of Whitfield County, Georgia (A 3). In Georgia, Clerks of Superior Courts are not judicial officers and are not required to have

legal training and do not have authority to exercise any discretionary function.[1]

The garnishment action was served by a Deputy Sheriff of Whitfield County, Georgia on August 20, 1971, the same date filed (A 8).

The garnishment action was based upon the printed form conclusory statement:

> "... Affiant has reason to apprehend the loss of said sum or some part thereof unless process of garnishment issues."

No other facts are stated in the affidavit except the amount of the claim and that an indebtedness was owing upon a suit pending. No judicial officer conducted any independent investigation into the grounds for the issuance of the garnishment writ, nor is there any record of a factual presentation having been required or made.

NGF had on deposit with FNB DALTON at the time of summons of garnishment, a certain sum of money which constituted its payroll account. The effect of the garnishment action was to freeze whatever sums NGF had on deposit with the bank at that time. Upon service, FNB DALTON rejected all weekly payroll and other presented checks of NGF and created a serious labor crisis for NGF and further caused NGF credit embarrassment with its material suppliers. NGF brought cash from another source as soon as possible and in effect "banked" their own employees' checks by cashing them. On the following Monday, August 23, 1971, as soon as the Courthouse opened for regular business, NGF

[1]Georgia Code Title 24 Chapter 2701 et seq.

and its security posted bond not only for the purpose of freeing its bank account but also for the purpose of creating standing[2] in the Georgia Courts to attack the procedure followed in the issuance of the writ.

[2]The Georgia Courts do not consider any person, firm or corporation, such as NGF, to have any standing whatsoever to complain of the issuance of garnishment as above until bond has been made. Until such bond is made the Georgia Courts hold that the action pends between the plaintiff and the garnishee only, and the Courts will not hear any attack from the defendant. *Jackson v. Barksdale*, 17 Ga. App. 461, Case No. 2 (1915); *Powell v. Powell*, 95 Ga. App. 122 (1957).

PART VI

(Rule 40 (1) (g))

ARGUMENT AND CITATION OF AUTHORITY

At the outset, NGF acknowledges that it does not contest the constitutionality of the substance or procedure of any post judgment garnishment as might be provided by the Georgia statutory scheme for garnishment. What is contested and presented to this Court for determination is the constitutionality of the issuance of garnishment *pendente lite* by a non-judicial officer, without judicial inquiry, without any showing of fact provided or made and without any notice or hearing prior to the issuance of garnishment or, in the alternative, some procedure for immediate hearing and relief after issuance.

The issue before this Court, as stated, is governed by the Fourteenth Amendment to the United States Constitution, specifically the "due process" clause thereof, as it has been interpreted by *Sniadach v. Family Finance Corporation of Bay View, et al*, 395 U.S. 337 (1969) and its prodigy. As this Court has prudently observed, the rulings of the *Sniadach, supra*, decision are well established in the legal foundations of the common law and do not alter the prior law.[3] *Sniadach* reaffirmed and acknowledged the basic principles of "due process" by requiring notice and prior hearing before prejudgment garnishment of an individual's wages. In so ruling, the Wisconsin prejudgment garnishment statute was declared unconstitutional for failing to comply with these "due process" standards. Although not a lengthy opinion as measured by words, Justice Douglas' statements in the *Sniadach* decision readily settled the issue of notice and hearing in cases of this nature.

[3]The United States Supreme Court has long recognized the exception that summary seizure procedure may well meet the requirements of due process in *extraordinary situations. Faugby v. Mallonee*, 332 U.S. 245 (1947); *Ewing v. Mytinger and Casselberry*, 339 U.S. 594 (1950).

To date the most important case to be spawned by *Sniadach* undoubtedly is *Fuentes v. Shevin*, 407 U.S. 67 (1972) in which the Court took the opportunity to expound on the ramifications of its earlier opinion. Justice Stewart, writing for the majority, developed an in-depth review of the law on "due process" rights before deprivation of property. In *Fuentes, supra*, the Court confronted the issue of the constitutionality of the Florida Prejudgment Replevin Statutes which allowed a private party, without a hearing or prior notice to the other party, to obtain a writ of replevin upon an *ex parte* application to an official of the state—*a clerk of court*—and upon posting a bond in an amount double the value of the property to be taken. Upon delivery of the writ of replevin to the Sheriff he was required by Florida law to seize the property described therein. Thereafter, the defendant had the right to reclaim possession of that property by posting his own security bond for double the value of the property. In ruling as it did, this Court recognized that *Sniadach* was not an action that was limited and confined to the singular question of prejudgment garnishment of wages or other such necessities. This Court observed the contrary to be true. In the now familiar quote of *Fuentes, supra*, the Court stated the breadth of its ruling, to-wit:

> "No doubt, there may be many gradations in the 'importance' or 'necessity' of various consumer goods.

> Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally. And under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary'."

In further progression of the implication of "due process" rights, this Court recently published its decision in the case of *Mitchell v. W. T. Grant Company*, 42 L.W. 4671 (May 13, 1974). In distinguishing the constitutionality of the Louisiana sequestration procedure for securing property from those of Wisconsin and Florida, dealt with in *Sniadach, supra*, and *Fuentes, supra*, it stated ". . . we are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us. . ."

In the *Mitchell, supra*, decision, the Louisiana Code of Civil Procedure made available to a mortgagee or lien holder a writ of sequestration to forestall waste or alienation of the encumbered property. The writ was issued under the authority of a *judge* in Orleans Parish and would be issued only when the nature of the claim, the amount, and the grounds relied upon for the issuance of the writ clearly appeared from *specific facts shown by a verified petition* or affidavit and a sufficient bond was filed by the creditor. Moreover, *the statute entitled the debtor immediately to seek dissolution of the writ*, which must be ordered unless the *creditor proves the grounds upon which the writ issued*. Alternately, if he should so choose, the debtor, with or without moving to dissolve the sequestration, could regain possession by filing his own bond to protect the creditor.

The primary distinctions between the Louisiana statute and the other statutes considered in *Fuentes* and *Sniadach* were discussed at length. Summarized they are:

1. Under the Louisiana procedure, *the writ of sequestration would not issue on the conclusory allegations of ownership or possessory rights as was the situation under the Florida law*. A higher standard was required which necessitated the verified petition to state the claim, the amount, and the specific facts surrounding the grounds for the claim.

2. Furthermore, in *Fuentes, supra*, the writ was issued by the Clerk of the Court; however, under the Louisiana law reviewed in *Mitchell, supra*, the writ would issue only by a judge.

3. The debtor in the more recent decision has the immediate right to demand dissolution of the writ and such would be granted unless the creditor proves the grounds upon which the writ was issued. No such safeguard was provided in Florida.

4. With these differences in consideration, this Court further noted that under the facts of the *Mitchell* case, *supra*, the property sequestered was not exclusively the property of the debtor.

> "The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current,

> real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interest of the buyer of the property but those of the seller as well." *Mitchell v. W. T. Grant Company*, 42 L.W. at 4672.

Accordingly, there were at least two sets of property rights to be protected in the sequestered property. The Court balanced these opposing interests examining each in light of the safeguards written into the Louisiana Code and concluded that as prepared that legislation met all necessary constitutional due process requirements.

The Georgia statute, *sub judice*, is factually distinguishable from the code provisions in *Mitchell v. W. T. Grant Company*, *supra*, and substantially analogous to those in *Fuentes v. Shevin*, and *Sniadach v. Family Finance Corp. of Bay View*, *supra*, as viewed in the light of constitutional due process. Thus, the language of the *Mitchell*, *supra*, opinion is strong support for the proposition that the Georgia statute lacks the necessary due process requirements.

Georgia Code § 46-101 provides the basic power of prejudgment garnishment for the plaintiff of a suit pending. The statutory scheme of garnishments is found in Title 46, Georgia Code. The procedure for accomplishment of said prejudgment garnishment is outlined in Georgia Code § 46-102, § 46-103, § 46-104 and § 46-401.

An agent of Di-Chem appeared before the clerk of the Superior Court of Whitfield County, Georgia; made a conclusory affidavit that NGF was indebted to his company; and posted a bond. In Georgia, as in Florida, the clerk of the court is not a judicial officer and accordingly there was no

judicial order, approval or participation as was the situation in *Mitchell*, *supra*. Furthermore, . . . "there is no requirement that the applicant make a convincing showing before the seizure", *Fuentes*, *supra*, at pp. 73 and 74, nor in Georgia could such a showing have been made since no judicial officer's participation is required. The record reveals that the president of Di-Chem simply affirmed that "North Georgia Finishing, Inc., defendant, is indebted to said plaintiff in the sum of $51,279.17 Dollars . . . and that said plaintiff has a suit pending returnable to the Superior Court of Whitfield County" (A 3). No showing of facts supporting the alleged debt was made.[4] The Georgia law simply does not meet the standard of due process outlined in the *Mitchell* case in that in Georgia the affiant must give only conclusions, not facts, i.e., that the debtor is indebted and the amount. The Georgia law, like the Florida law, . . . "automatically relies on the base assertion of the party seeking this writ that he is entitled to one and allows a court clerk to issue the writ summarily". *Fuentes*, *supra*, at p. 74. As in Florida, Georgia Code § 46-102, does require that the creditor . . . "give bond, with good security, in a sum at least equal to double the amount sworn to be due". However, as so aptly noted in *Fuentes*, *supra*, these requirements are hardly a substitute for a prior hearing for they test no more than the strength of the creditor's own belief in his rights or the comparative financial strength of the contending parties. The bond affords the alleged debtor no suitable safeguards against arbitrary deprivation of property.

Also, a provision of the Louisiana Code on sequestration provided that the debtor may *immediately* have a full hearing

[4]Moreover, the seizure was accomplished without the slightest showing that there existed any situation which required special protection to the state or to the creditor-appellee's interest. *Bell v. Burson*, 402 U.S. 535 (1971); *Boddie v. Connecticutt*, 401 U.S. 371 (1971). See also *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950).

on the matter of possession following the execution of the writ and further places the burden of establishing the right to the writ on the plaintiff. The majority of the Court concluded that this was a significant safeguard of due process rights that was not available under the Florida law and observed "Louisiana law expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued' . . . Act. 3506," *Mitchell, supra*, at p. 4677. This procedure enables the debtor to contest at an early date the facts as sworn by the creditor in his affidavit. This procedure prevents the all too common situation of having the matter suspended to wait the normal lengthy delay inherent in determining the merits of the case in chief. Georgia has chosen to draft its prejudgment garnishment legislation in such a manner as to require no hearing at any time on the right of garnishment but to require the parties to confront each other only in the posting of bonds. The importance of the hearing provision is strongly emphasized by this Court in *Mitchell, supra*, and the protection was afforded the defendant appears to be primary in the Court's decision to sustain the questioned procedure.

Notwithstanding the general Georgia statutory provisions provided for testing the sufficiency of pleadings, *Georgia Code Chapter* 81*A*, *Civil Practice Act*[5], there are no statutory provisions in Georgia for the dissolution of the writ of garnishment upon a showing of fact. There is no statutory method to determine upon what facts the conclusions of the affidavit are based. Further as noted in the statement of facts herein there is no provision for a hearing of any kind

[5]The Civil Practice Act of Georgia is in substantial accord with the Federal Rules of Civil Procedure. Specifically, Georgia Code Title 81A §112 provides for a motion for more definite statement and a motion to strike.

until bond is made. Thus, under the Georgia statutory scheme, NGF and others similarly situated are deprived of the use of property for an undeterminate length of time.

It should be noted that in the case *sub judice* the creditor had no interest whatsoever in the garnished property, i.e., the bank account of NGF. As would appear to be the fact situation, similar to *Sniadach, supra*, on this point, Di-Chem had no lien, mortgage, security interest, or property right in the bank account funds. The necessity of protecting the interest of all parties was a strong influence in the *Mitchell* case, *supra*. In this situation, where both parties held equitable interest in the property when considered with the other procedural provisions of the Louisiana statute, the substantive rights created by the Louisiana legislature effected a constitutional accommodation of the conflicting rights of the parties.

NGF is a corporate entity and was engaged at the time of the institution of this action in the dyeing and finishing of rugs and carpets for various manufacturers, and as such is no different from any other corporate or individual person engaged in commerce in that it occupied a dual role, that is to say, the role of creditor to some and debtor to others. Accordingly, NGF readily acknowledges that some statutory provision is necessary to effect a constitutional accommodation of the conflicting interests of debtor and creditor. NGF recognizes that there must be a constitutional and legal method for determining and collecting accounts, and that there must be a constitutional and legal method of disputing the same and resolving these disputes within a framework of fundamental fairness and due process which this Court has held the Louisiana statute to provide.

Further, contradistinguishing the instant case from the

Mitchell case, we note that the Court is not presented a fact situation here wherein the debtor has any property interest whatsoever in the sequestered bank account of NGF. As a means of emphasis, it should be noted that funds of NGF bank account were to be used for payment of the wages of its employees. This Court has continuously recognized the singular nature of this type of property and has required reasonable adherence to due process standards when it is in question.

Lastly, the petitioner desires to emphasize that, although this review was granted on its petition for writ of certiorari to the Georgia State Supreme Court which upheld the consitutionality of the Georgia Code § 46-101, this same statute has been most recently declared unconstitutional by a United States Three-Judge District Court. In *Morrow Electric Co., Inc. v. Harold R. Cruse, et al*, Civil Action No. 19008 (N.D. Ga., January 28, 1974) (opinion supplied the Court in Petitioner's Supplemental Brief to Writ of Certiorari), the Court had before it the identical issue as that which the Supreme Court of the State of Georgia had ruled upon only three months before in the instant case. Although aware of this point, and noting the same in its opinion, the District Court pointed out that the Georgia Supreme Court's opinion had not even mentioned the *Fuentes* decision, *supra*, and had concluded that *Sniadach, supra*, was no more than the exception of one limited area, i.e. wages, from prejudgment seizure.

In *Morrow Electric Co., supra*, the facts were very similar to those in review here since a bank account was the subject of the garnishment in both. Noting that a bank account was involved, the District Court opined, "Furthermore, it is not clear that all the equities in this case are on the side of the defendant. The economic impact of even a temporary deprivation of the bank account in question could be quite

severe should it result in the seizure of the plaintiff's operating assets". Further, the Court noted with interest *Aaron v. Clark*, 342 F. Supp. 898 (N.D. Ga., May 4, 1973) which had earlier considered the Georgia authority to garnish a bank account which contained funds set aside for college tuition. That Three-Judge District Court, relying upon *Sniadach, supra*, before this Court had delivered the *Fuentes* decision, concluded that the Ga. Code § 46-101 was unconstitutional as applied to the above facts; however, it did limit its holding to the particular type funds deposited in the bank account, i.e., college tuition.

Petitioner, NGF, is in complete agreement with the District Court that it is unfair and constitutionally prohibited to economically bludgeon an alleged debtor into payment or settlement of an account by depriving that debtor of the means of existence or of the very means of protesting and asserting his rights or the means with which to pay and settle an account free of economic coercion without some minimum notice and hearing.

Furthermore, as noted in *Morrow, supra*, the Supreme Court of Georgia erred in ignoring the holding of this Court in *Fuentes, supra*, to the effect that the deprivation of the *use* of property is the deprivation of a function of that property which is constitutionally protected by the Fourteenth Amendment. The Supreme Court of Georgia, in strained reasoning, disregarding the *Fuentes* decision, held in effect that NGF had not been deprived of anything by State action and that title to the funds in the bank had not been transferred by the garnishment but merely sequestered. The Georgia Court analogized this to a *"lis pendens"* pending the outcome of the case in chief.

But as stated in *Fuentes*:

> "The Fourteenth Amendment's protection of "property' however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest' ".

This is particularly true of an asset such as money or bank accounts. Money, currency or a bank account in and of itself is of no value. These forms of property cannot be worn, eaten or processed into manufactured goods. Their purpose and reason for existence lies only in their use so that they may be used, exchanged and converted into food, clothing, manufactured goods and other essentials of life and commerce. Nor is the Supreme Court of Georgia correct when it holds that garnishment is analogous to *lis pendens*. In the typical Georgia *lis pendens* situation, a claim is made by one holding an equitable interest in the property sought to be sequestered. *J. W. B. Edwards v. Ellison Banksmith and James H. Mulford*, 35 Ga. 213. In Georgia, *lis pendens* cannot be asserted by one to attach property in which the assertor has no equitable claim of title. *Watson v. Whatley*, 218 Ga. 86. Further, pending determination of the typical Georgia case wherein *lis pendens* is filed, usually against real estate, the person in possession of that property is permitted to retain and to continue to use the same. *Burkhalter, et al v. Glennville Bank*, 184 Ga. 147.

The Supreme Court of Georgia in choosing not to rely upon *Fuentes v. Shevin, supra*, relied upon *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150, (U.S.D.C. Hawaii, 1970); notwithstanding the fact that the Supreme Court of Hawaii in a prejudgment garnishment case upon a bank account closely analogous to the case *sub judice* had reached

the opposite conclusion in *Brunswick Corporation v. Galaxy Cocktail Lounge, Inc.*, et al, 513 P. 2nd 1390.

The Supreme Court of Hawaii stated in a footnote in the *Brunswick Case, supra*:

> "We are, of course, mindful of contrary decisions regarding bank accounts, especially *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150, (D. Hawaii 1970). This case, however, preceded the Supreme Court's clarification in *Fuentes*."

The Hawaii Supreme Court further observed that the U. S. District Court's judgment in *American Olean Tile Co., supra*, specifically deferred to the legislature of Hawaii and previous decisions of the Hawaii Supreme Court, all of which predated *Fuentes*.

PART VII

(Rule 40 (1) (h))

CONCLUSION

Petitioner respectfully submits that the Georgia statutory scheme of prejudgment garnishment is violative of the due process provision of the Fourteenth Amendment of the United States Constitution in that it does not provide for hearing and prior notice. Specifically, the Georgia law is lacking in that it fails to provide reasonable safeguards such as *judicial controls, showing of specific facts in the affidavit,* and the *right to a hearing* either prior to or immediately after the garnishment issues. Further, the property in question in the instant case is solely owned and titled in the petitioner without the barest property interest in the respondent.

Thus, following the enlightened decisions of this Honorable Court in *Sniadach, supra, Fuentes, supra,* and *Mitchell, supra,* the Georgia garnishment statute should be declared unconstitutional in its prejudgment application.

PART VIII

STATEMENT OF CASES AND STATUTES CITED

Aaron v. Clark,
342 F. Supp. 898 (N.D. Ga. 1973)

American Olean Tile Company v. Ralph E. Zimmerman, Jr.,
317 F. Supp. 150 (D. Hawaii, 1970)

Bell v. Burson,
402 U.S. 535 (1971)

Boddie v. Connecticutt,
401 U.S. 371 (1971)

Ewing v. Mytinger and Casselberry,
339 U.S. 594 (1950)

Faughy v. Mallonee,
332 U.S. 245 (1950)

Fourteenth Amendment, U. S. Constitution

Georgia Code § 24-2701, *et seq.*

Georgia Code § 46-101

Georgia Code § 46-102

Georgia Code § 46-103

Georgia Code § 46-104

Georgia Code § 46-401

Georgia Code § 81A-112

Jackson v. Barksdale,
17 Ga. App. 461 (1915)

J. W. B. Edwards v. Ellison Banksmith and James H. Mulford, 35 Ga. 213 (1866)

Mitchell v. W. T. Grant Company,
42 L.W. 4671 (May 13, 1974)

Morrow Electric Co., Inc. v. Harold R. Cruse,
Civil Action No. 19008 (N.D. Ga., January 24, 1974)

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950)

Powell v. Powell,
95 Ga. App. 122 (1957)

Watson v. Whatley,
218 Ga. 86 (1962)

PROOF OF SERVICE

GEORGIA, WHITFIELD COUNTY.

I, WARREN N. COPPEDGE, JR., Attorney for Petitioner, North Georgia Finishing, Inc., in Case No. 73-1121, October Term, 1973, in the Supreme Court of the United States, against Di-Chem, Inc., Respondent, and First National Bank of Dalton, Garnishee, do hereby swear that on this the 9th day of July, 1974, I served a copy of the foregoing Brief of Petitioner together with Appendix thereto on Di-Chem, Inc., Respondent, and First National Bank of Dalton, Garnishee, by mailing three copies of the foregoing Brief and Appendix to their counsel of record, H. E. Kinney, Esq., Pittman, Kinney, Kemp, Pickell & Avrett, P. O. Box 398, Dalton, Georgia 30720, of counsel for Respondent, and Carlton McCamy, Esq., McCamy, Minor, Phillips & Tuggle, P. O. Box 1105, Dalton, Georgia 30720, of counsel for the Garnishee.

Warren N. Coppedge, Jr.

WARREN N. COPPEDGE, JR.
ATTORNEY FOR PETITIONER

Sworn to and subscribed before me,
this the 9th day of July, 1974:

Kaye C. Jordan

NOTARY PUBLIC, GA. STATE AT LARGE

Supreme Court, U. S.
FILED
AUG 6 1974
MICHAEL

SUPREME COURT OF THE UNITED STATES

NO. 73-1121

NORTH GEORGIA FINISHING, INC., Petitioner

V.

DI-CHEM, INC., Respondent

THE FIRST NATIONAL BANK
OF DALTON, Garnishee

GRANT OF WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF GEORGIA

IN ITS CASE NO. 28,217

BRIEF OF RESPONDENT

Lemuel Hugh Kemp
H. E. Kinney
Pittman, Kinney, Kemp, Pickell & Avrett
Corner of Crawford and Selvidge Streets
Dalton, Georgia 30720

ATTORNEYS FOR RESPONDENT

THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

RESPONDENT'S BRIEF

INDEX

Part I (Rule 40 (1) (a)) Statement of the Case ....Page 2

Part II (Rule 40 (1) (b)) Statement of Jurisdiction .....Page 2

Part III (Rule 40 (1) (c)) Statement of Statutes and Constitutional Provisions Involved .....Page 2

Part IV (Rule 40 (1) (d) (1)) Questions Presented For Review .....Page 3

Part V (Rule 40 (1) (e)) Statement of Facts .....Page 4

Part VI (Rule 40 (1) (g)) Argument and Citation of Authority .....Page 7

Part VII (Rule 40 (1) (h)) Conclusion .....Page 17

Part VIII Statement of Cases and Statutes Cited .....Page 18

Proof of Service .....Page 20

THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

RESPONDENT'S BRIEF

PART I

(Rule 40 (1) (a))

PART II

(Rule 40 (1) (b))

PART III

(Rule 40 (1) (c))

The Respondent Di-Chem, Inc., has no supplemental statement under Parts I, II, and III by Petitioner, North Georgia Finishing Company, except to submit that the issues raised by Petitioner, North Georgia Finishing Company, are moot, and, therefore the Court should decline to accept jurisdiction of this case or else refuse to rule on the merits for the reasons set forth in Part VI of this brief. *DeFunis v. Odegaard*, ____ U.S. ____, 94 S. Ct. 1704 (1974).

PART IV

(Rule 40 (1) (d) (1))

QUESTIONS PRESENTED FOR REVIEW

(1) Are the issues purportedly raised by Petitioner moot in view of Petitioner having had a bond posted by an affiliate corporation dissolving the garnishment process herein contested and having obtained all moneys originally subject to the garnishment?

(2) Does the due process clause of the Fourteenth Amendment require prior notice of a garnishment of a bank account of a debtor corporation under circumstances as would permit the debtor corporation to remove its property from the jurisdiction of the Court in the event of the giving of prior notice, and is not the property right of the debtor protected by the requirement of a bond for double the amount of the sum sued for under the provisions of Georgia Code Section 46-101, et seq.?

(3) Should the case of *Fuentes v. Shevin*, 407 U. S. 67 (1972), even if controlling of the due process issue be given retroactive application contrary to established legal principles?

PART V

(Rule 40 (1) (e))

STATEMENT OF FACTS

A Whitfield County, Georgia corporation, Di-Chem, Inc., filed a complaint on August 20, 1971, in the Superior Court of Whitfield County against North Georgia Finishing, Inc., alleging that the defendant was a foreign corporation and was indebted to the plaintiff in the sum of $51,279.17 for goods sold to the defendant.

Simultaneously with the filing of this complaint, Di-Chem, Inc., pursuant to the terms of Georgia Code Annotated Section 46-101, et seq., filed an affidavit and a bond for process of garnishment to issue against the First National Bank of Dalton as garnishee (A 3-4). This garnishment was issued pursuant to the statute as it contained the necessary allegations of fact and the required bond in double the amount sought in the original suit so as to protect the defendant-debtor in the event plaintiff's action should not have any foundation in fact or should be defeated (A 5). The garnishment was based upon the signed affidavit of fact of the President of plaintiff corporation that "affiant has reason to apprehend the loss of said sum or some part thereof unless process of garnishment issue." (A-4). Thereupon, process issued and was served by the Deputy Sheriff of Whitfield County, Georgia, on the First National Bank of Dalton on August 20, 1971. (A-8).

There is nothing in the record before this Court to indicate the sum of money in the bank account, nor to indicate that it was other than the general banking account of the defendant-debtor. The statement on page 3 of the Petitioner's Brief that it constituted a "payroll account" is not supported by the record and should be disregarded. Likewise, the statement in Petitioner's brief that the First National Bank of Dalton rejected all weekly payrolls and other presented checks of North Georgia Finishing, Inc., and created a serious labor crisis and credit embarrassment for said company is not in the record and therefore should be ignored by the Court. In any event even if said statements were true they would be irrelevant to the issues before the Court.

On Monday, the first regular business day following the service of garnishment on Friday and pursuant to the terms of the Georgia statute, the defendant posted a bond. A Mr. Daniel Mathews signed both for the principal, North Georgia Finishing, Inc., and for its bondsman, Beaver Creek Industries, Inc., designating himself as Vice President of both companies (A-9). We do not *know* the reason for posting the bond other than to dissolve the garnishment and release the bank account. The statement in Petitioner's Brief that it was also "for the purpose of creating standing" is a mere supposition of counsel and is not a statement which should be accepted by this Court as a "fact" in consideration of the merits of the case. Counsel could have attacked the garnishment in other ways either in the State or Federal Courts, but in any event failed to file any attack on the garnishment for three weeks. (A 12).

Petitioner was apparently notified of this garnishment on August 21, the same day it was served on the bank because it posted a dissolution bond on Monday, August 23, and the Judge of the Whitfield Superior Court entered the following order:

> "It appearing to the Court that the defendant in the within case has filed a proper dissolution bond

dissolving the within garnishment, it is thereupon considered ordered and adjudged that said garnishee, the First National Bank of Dalton, Dalton, Georgia, be hence discharged.

This 23 day of August, 1971.

/s/ Robert L. Vining, Jr.
J. S. C. C. C. "
(Judge, Superior Court
Conasauga Circuit) (A-10)

More than *three weeks after* posting the bond, North Georgia Finishing, Inc., filed a "Motion to Dismiss" the garnishment as being "Unconstitutional" and not meeting certain technical requirements of the Georgia law. (A-11, 12). After a thorough hearing on the merits of the motion with movant having an opportunity to present facts and law, the Trial Court overruled the motion on November 29, 1971. (A-13).

Thereafter, the case worked its way through the Georgia appellate procedure as outlined in Part I, Rule 41 (a) of the Petitioner's Brief and is now before this Honorable Court.

PART VI

(Rule 40 (1) (g))

ARGUMENT AND CITATION OF AUTHORITY

I. THE ISSUE OF THE VALIDITY OF THE GARNISHMENT WAS RENDERED MOOT BY THE POSTING OF BOND WITHOUT A PRIOR OR SIMULTANEOUS ATTACK ON THE GARNISHMENT AND BY THE TRIAL COURT'S DISSOLUTION OF THE GARNISHMENT.

In the case of *Roberts v. Seanor*, 46 Ga. App. 5, 166 S. E. 375 (1932), the Court of Appeals of Georgia stated the Georgia law as follows:

> "The dissolution bond takes the place of the property or fund garnisheed, and is conditioned to pay whatever judgment might be obtained against the garnishee or the funds sought to be impounded."

Therefore, the process of garnishment at the time the debtor sought to make a constitutional attack thereon, ***had already been dissolved and any issue concerning the original garnishment had become moot.*** Moreover, both the principal and the bondsman are no longer in business or else dissolved or bankrupt according to counsel's best knowledge, information, and belief and therefore there are no property rights now at stake. It is a well established rule that moot issues will not be considered by this Court although serious Constitutional rights may have been involved in the Court below. This principle was most recently reaffirmed by this Court in the case of *DeFunis v. Odegaard, supra.*

II. THE FACTS OF THIS CASE MORE CLEARLY FALL WITHIN THE COURT'S OPINION AND THE DIRECTION OF THE COURT INDICATED IN THE CASE OF *MITCHELL V. W. T. GRANT COMPANY*, NO. 72-6160, 42 L.W. 4671 (May 13, 1974), THAN THEY DO WITHIN THE CASE OF *SNIADACH V. FAMILY FINANCE CORPORATION OF BAY VIEW*, 395 U. S. 337 (1969) OR ITS PROGENY, INCLUDING *FUENTES V. SHEVIN*, 407 U. S. 67 (1972).

This Court has long recognized that some summary seizure procedures fall within properly recognized exceptions which may well meet the requirements of due process in certain situations. *Fahey v. Mallonee*, 332 U. S. 245; and *Ewing v. Mytinger & Casselberry*, 339 U. S. 594. Also, the Court has recognized summary seizure by the Internal Revenue Service of property of taxpayers for alleged undue taxes without any previous hearing, as to whether the tax was due. Although not all of the facts were in the complaint or before this Court, it can read between the lines. It has been established based on its affidavit and the Trial Court's hearing on the merits thereof that Di-Chem, Inc., had cause to apprehend the loss of the money. In the case *sub judice* the Court is not dealing with parties with relative dissimilar powers or a contract of "adhesion" as in the case of *Mitchell v. W. T. Grant Company, supra.* Here the Court is dealing with a complaint by one corporation against another corporation wherein the President of the suing corporation whose word was accepted by the trial court has made an affidavit that it has reason to apprehend that unless a garnishment issue, that it has reason to apprehend a loss of over $50,000.00. It is a reasonable assumption that if the debt could not be collected except by suit that the debtor is insolvent or may even remove its property out of the State of Georgia and that the money in the bank account would not be forthcoming to pay any indebtedness. The Court overruled a motion of North Georgia Finishing based on its allegations that "Plaintiff (Di-Chem) . . . had no reason to apprehend the loss of any part of any judgment . . . and therefore (plaintiff) had no grounds upon which to base said writ of garnishment." (A-13) Since the Trial Court overruled this motion after hearing argument and/or evidence, this clearly indicates that Di-Chem had a valid reason for the issuance of the garnishment including possible loss of $51,279.17. North Georgia Finishing, Inc., was protected by Di-Chem's filing of a bond in double the amount for which it sued and if Di-Chem's suit was groundless, North Georgia had the opportunity to recover up to double the sum for which it had been sued. When "weighing the balances" under the due process clause, it appears in the instant case that the interests of Di-Chem, Inc., in preventing a debtor from absconding is no less important than the interest of the Federal Government in collecting its taxes by the filing of liens and the seizure of property without a bond or other methods to attack the action or to secure release of the property as is provided under the Georgia Garnishment Statutes. As stated in *Fuentes v. Shevin, supra,* there are "extraordinary situations" which justify postponing an opportunity for a notice and a hearing, one of these being a general public interest which respondent submits is here involved. First, the public interest in having debts paid and not having the sums moved out of the state and secondly, the need for *prompt* action which is evident here because if *prompt* action had not been taken, it can be reasonably assumed that the defendant debtor would have removed its property from the state or at least withdrawn all sums from the garnishee bank.

If the defendant were given notice of a hearing as to why a garnishment should not issue, the defendant would always have the opportunity of withdrawing its funds and

removing them from without the jurisdiction or otherwise dispose of the funds. The recent case of *Mitchell v. W. T. Grant Company*, affirming 263 La. 627, 269 So. 2d 186, is clearly a retreat from the broad statement in *Fuentes v. Shevin, supra,* relied upon by Petitioner in its brief.

The writ in the lower Court in *Mitchell v. W. T. Grant Company, supra,* was obtainable on the creditor's *ex parte* application without notice to the debtor or an opportunity for a hearing prior to the issuance and levy of the writ. In the *Mitchell* case, as in the instant case, the writ issued on a verified form affidavit and the creditor giving sufficient bond. In the particular Louisiana transaction involved the case began by the presentation of the affidavit to a city judge, whose qualifications are unknown, but the Louisiana Statute [Articles 282 and 283] provides generally that a Clerk of Court may issue the writ except in the Orleans Parish. It appears that in the *Mitchell* case and in the instant case that whether or not a judge or a clerk had the responsibility of issuing the writ or the garnishment, that based on the affidavit of the requisite facts, that the writ would have been issued in Louisiana either by the judge or by the Clerk of Court just as the Summons of Garnishment issued in Georgia under the Georgia Statute. As in the Louisiana case, the Georgia law provides that the debtor may immediately seek dissolution of the writ and, indeed in the case now before the Court, the debtor dissolved the garnishment within three days and regained possession of the bank account. Counsel respectfully submits that the Georgia statutory procedure as stated by this Court in the Louisiana case "effects a constitutional accommodation of the conflicting interests of the parties." To paraphrase the language of the Court in the case of *Mitchell v. W. T. Grant Company, supra,* counsel for the respondent "cannot accept the Petitioner's broad assertion that the due

process clause of the United States Constitution guaranteed to him (it) the use and possession of the goods (money) until all issues in the case were judicially resolved after full adversary proceedings had been completed." In the Louisiana case there was a contract between the parties and the contract was a contract of "adhesion." However, in the instant case, there is no disparity between the relative position of the creditor and debtor and the "constitutional accommodation" resolves itself down to whether the debtor is to be protected by the filing of a bond by the creditor or whether the creditor is to be left without recourse in the face of the debtor's clear opportunity to remove its property once it has notice of a possible garnishment. In the Louisiana case as in this case, the debtor "is permitted to regain possession by putting up his own bond to protect the seller (creditor)." 42 *Law Week* 4674. Indeed, in the Louisiana case, the debtor did not even file a bond! The following quote of the Court from that case is apropos of the facts in this case:

> "The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn ex parte documents followed by the early opportunity to put the creditor to his proof. The nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge. The potential damage award available, if there is a successful motion to dissolve the writ, as well as the creditor's own interest in avoiding interrupting the transaction, also contribute to minimizing the risk."

Finally, the following paraphrase and quote from the Louisiana case is appropriate to the facts involved in the case now before the Court:

> "Forth, we remain unconvinced that the impact on the debtor (North Georgia Finishing) of deprivation of the household goods (bank account) here in question overrides his (North Georgia's) inability to make the creditor (Di-Chem) whole for wrongful possession, the risk of destruction or alienation if notice and a prior hearing is supplied, and the low risk of a wrongful determination of the existence of possession (indebtedness) * * * *."

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation. *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961); *Stanley v. Illinois* 405 U. S. 645, 650 (1972)."

Again, as stated in *Mitchell v. W. T. Grant Company, supra*, at page 4675 this Court had unanimously approved "prejudgment attachment liens effected by creditors without notice, hearing or judicial order saying that:

> "More precisely to the point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing or judicial order, saying that "nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its affect upon the result of the suit." *"The fact that the execution is issued in the first instance by an agent of the State, but not from a Court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection." Coffin Brothers v. Bennett*, 277 U. S. 29, 31 (1928). To the same effect was the earlier case of *Ownbey v. Morgan*, 256 U. S. 94 (1921). Furthermore, based on *Ownbey* and *Coffin*, the Court later sustained the constitutionality of the Maine attachment statute. *McKay v. McInnes*, 279 U. S. 820 (1928). In that case, a nonresident of Maine sued in the Maine courts to collect a debt from a resident of the State. As permitted by statute, and as an integral part of instituting the suit, the creditor attached the properties of the defendant, without notice and without judicial process of any kind."

Insofar as the record reveals, the bank account was the only asset of the debtor available to satisfy the indebtedness of North Georgia and Di-Chem's "interest" of $51,279.17. Therefore, counsel for respondent respectfully submit that in view of this "interest," and all of the facts heretofore explained, that the language of this Court in *Fuentes v. Shevin, supra*, applies to this appeal:

> "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." 407 U. S. 679.

Again, as stated in part by Mr. Justice White in his dissent in *Fuentes v. Shevin, supra*, at page 99 "Dollars and cents considerations weigh heavily against false claims . . . as well as against precipitate action that would allow no opportunity for mistakes to surface and be corrected."

The United States Courts of Appeals and District

Courts have not been unanimous in their interpretation of *Sniadach v. Family Finance Company of Bay View, et al*, 395 U. S. 337 (1969), *supra*, or *Fuentes v. Shevin, supra*, and the decisions of these lower courts is clearly not controlling on the Supreme Court.

Therefore, the decision in *Morrow Electric Co., Inc. v. Harold R. Cruse*, et al, C.A. 19008 (U.S.D.C. N. D. of Georgia) cited by petitioner should not be given any more weight than the case of *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150 (1970), wherein the similar Hawaii garnishment statute was upheld or of the decision below of the Supreme Court of Georgia.

III. THE DECISION OF *FUENTES V. SHEVIN, SUPRA*, SHOULD NOT BE GIVEN RETROACTIVE APPLICATION.

It is clear that constitutional decisions may be made prospective only. *Linkletter v. Walker*, 381 U. S. 618, 85 S. Ct. 1731, 14 L.Ed. 2d 601 (1965). As stated in the case of *Ruotolo v. Gould*, 489 Fed. 2d 1324:

> "This form of judgment is particularly appropriate where retroactive application would have severe hardship to those who have relied upon the trial law in arranging their affairs. See 1 B. Moores, *Fed. Prac.* at 200, 201. In this circuit the federal courts called upon to declare invalid statutory schemes similar to the one in issue here have found that giving retroactive effect to their rulings would be unduly harsh and have therefore denied relief to those whose attachment proceedings had commenced prior to the effective date of the judgment."

In the cited case, the Court had struck down as illegal an attachment of a bank account in proceedings under New Hampshire law on the basis of denial of due process was illegal for failure to provide due process protection under the case of *Fuentes v. Shevin, supra*. In the case of *Trapper Brown Construction Co., Inc. v. Electro Mech, Inc.*, 358 F. Supp. 105 (1972), a case also involving garnishment, is was held that the ruling was not to have retrospective application. Likewise in the case of *Clement and R.E.I.C.O. Inc. v. Four North State Street Corporation, et al*, 360 F. Supp. 933 (1973), the Court held that inasmuch as a retrospective judgment would cast doubt on the validity of certain attachments pending in the New Hampshire courts that the ruling of unconstitutionality of Chapter 511 of the statute *would not be given* retrospective application:

> "Since a retrospective judgment would cast doubt on the validity of all real estate attachments in actions now pending in the New Hampshire courts and would create a cloud on the title to any property hitherto sold pursuant to a real estate attachment, our decree will be prospective only and will have no effect on any attachments, other than the attachment presently before us, which have been made prior to the date of this opinion."

In view of the foregoing rulings and in view of the fact that the garnishment laws of Georgia have never been declared unconstitutional or stated to be unconstitutional until this Court's decision in *Fuentes v. Shevin, supra*, in June of 1973, some *two years after* the filing of the complaint in the present case, the still unclear holding of *Fuentes v. Shevin, supra*, should not be given retrospective application. Since North Georgia Finishing has filed a bond and dissolved the garnishment and in view of all the facts

and law cited herein, counsel respectfully submits that the status of the parties in this case should not be changed by this Court.

PART VII

(Rule 40 (1) (h))

CONCLUSION

WHEREFORE, in view of the law and facts stated herein, this Court should decline to rule on this case because the issues are moot. If it determines to rule on the merits counsel respectfully submit it should not strain the due process clause to require prior notice and a hearing when the very requirement of a notice and a hearing will frustrate the objects of commerce in the collection of debts validly made and strike down a procedure which has already "balanced the interests."

Respectfully submitted,

LEMUEL HUGH KEMP
H. E. KINNEY
ATTORNEYS FOR RESPONDENT,
DI-CHEM, INC.
P. O. BOX 398
DALTON, GEORGIA 30720

PART VIII

STATEMENT OF CASES AND STATUTES CITED

American Olean Tile Company v. Ralph E. Zimmerman, Jr.,
317 F. Supp. 150 (D. Hawaii, 1970)

Clement and R.E.I.C.O., Inc. v. Four North State Street Corporation, 360 F. Supp. 933 (1973)

DeFunis v. Odegaard,
____ U.S. ____, 94 S. Ct. 1704 (1974)

Ewing v. Mytinger and Casselberry,
339 U. S. 594 (1950)

Fahey v. Mallonee,
332 U. S. 245 (1950)

Fuentes v. Shevin,
407 U. S. 67 (1972).

Georgia Code § 46-101, *et seq.*

Linkletter v. Walker,
281 U. S. 618, 85 S. Ct. 1731, 14 L.Ed. 2d 601 (1965)

Mitchell v. W. T. Grant Company
No. 72-6160, 42 L.W. 4671 (May 13, 1974)

Morrow Electric Co., Inc. v. Harold R. Cruse,
C.A. 19008 (U.S.D.C. N.D. of Georgia)

Roberts v. Seanor,
46 Ga. App. 5, 166 S. E. 375 (1932)

Ruotolo v. Gould,
489 Fed. 2d 1324

Sniadach v. Family Finance Corporation of Bay View,
395 U. S. 337 (1969)

Trapper Brown Construction Co., Inc. v. Electro Mech, Inc.,
358 F. Supp. 105 (1972)

PROOF OF SERVICE

GEORGIA, WHITFIELD COUNTY.

I, LEMUEL HUGH KEMP, Attorney for Respondent, Di-Chem, Inc., in Case No. 73-1121, October Term, 1973, in the Supreme Court of the United States, do hereby swear that on this the 5th day of Aug., 1974, I served a copy of the foregoing Brief of Respondent on North Georgia Finishing, Inc., Petitioner, and The First National Bank of Dalton, Garnishee, by mailing with sufficient postage thereon, three copies of the foregoing Brief to their counsel of record, Warren N. Coppedge, Jr., Esq., Mitchell, Mitchell, Coppedge and Boyett, P. O. Box 668, Dalton, Georgia 30720, of counsel for Petitioner, and Carlton McCamy, Esq., McCamy, Minor, Phillips & Tuggle, P. O. Box 1105, Dalton, Georgia 30720, of counsel for the Garnishee.

/s/ L. Hugh Kemp

LEMUEL HUGH KEMP
ATTORNEY FOR RESPONDENT
P. O. Box 398
Dalton, Georgia 30720

Sworn to and subscribed before me,

this the 5th day of Aug., 1974:

/s/ Henry A. Thaggard

NOTARY PUBLIC, GEORGIA STATE AT LARGE